TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 395.

EDWARD C. OSBORN AND JOSEPH J. SLOCUM, AS TRUSTEES OF THE HASTINGS AND DAKOTA RAILWAY COMPANY, PLAINTIFFS IN ERROR,

vs.

PETER FROYSETH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED MARCH 26, 1909.

(21,565.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 8, 1909.

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a To the Honorable Charles M. Start, Chief Justice of the Supreme Court of the State of Minnesota:

The petition of Edward C. Osborn and Joseph J. Sloeum, as trustees of the Hastings and Dakota Railway Company, respectfully represents that on or about the 9th day of March, 1909, there was entered in and by the Supreme Court of the State of Minnesota, the same being the highest court in the State, a final judgment in a certain case therein pending between the said trustees, appellants in the Supreme Court of Minnesota, (plaintiffs in the District Court of Chippewa County, Minnesota, the Court of original jurisdiction in said state), and Peter Froyseth, respondent in said Supreme Court of Minnesota (and defendant in said District Court), said judgment being in favor of the said respondent and in affirmance of the judgment previously rendered by said State District Court in his favor. That in said Judgment of said Supreme Court, and in the proceedings had prior thereto in said cause, certain errors were committed to the prejudice of these plaintiffs (Appellants in said Supreme Court), all of which will more fully appear from the assignment of errors herewith submitted and filed, and from a certified transcript of the record in said cause herewith submitted. That in said cause a title and right was and is claimed by your petitioner under the statute of the United States and by virtue of the commission held and authority exercised under the United States, and the decision and judgment in said cause is against the said title and right specifically set up and claimed by your petitioner under the said statute, commission and authority.

Therefore these plaintiffs (appellants in said Supreme Court of the State of Minnesota) pray that a writ of error may be issued in this behalf to the said Supreme Court of the State of Minnesota for the correction of the errors so complained of, and that a transcript of the record proceedings and papers in this cause duly authenticated, may be sent to the said Supreme Court of the United States.

Dated March 9, 1909.

OWEN MORRIS,
Attorney for Appellants.

b In the event of the allowance of the foregoing petition for writ of error from the Supreme Court of the State of Minnesota to the Supreme Court of the United States of America in the case of Edward C. Osborn and Joseph J. Sloeum, as Assignees in Trust of the Hastings and Dakota Railway Company, plaintiffs in error, against Peter Froyseth, defendant in error, the bond on appeal is hereby waived, and it is stipulated that the writ of error in said cause, if issued, and all proceedings on the appeal, shall have like effect as though a supersedeas bond had been filed.

March 9th, 1909.

C. A. FOSNES,
Attorney for Respondent, Peter Froyseth.

Supreme Court of the United States.

EDWARD C. OSBORN and JOSEPH J. SLOCUM, as Trustees of the Hastings and Dakota Railway Company, Plaintiffs in Error,
vs.
PETER FROYSETH, Defendant in Error.

On reading the foregoing petition for writ of error and the stipulation thereto annexed and the assignment of errors and transcript of the record therewith submitted, the said writ is hereby allowed, supersedeas bond having been waived by the said stipulation.

Dated March 9th, 1909.

CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

c STATE OF MINNESOTA,
Supreme Court, ss:

I, C. A. Pidgeon, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Petition for writ of error and stipulation waiving supersedeas in the cause therein entitled, as appears from the original, remaining on file in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom, and of the whole thereof.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul, this 10th day of March, A. D. 1909.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON, *Clerk.*

d UNITED STATES OF AMERICA:

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Minnesota, Greeting:

Because of the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said Supreme Court of the State of Minnesota before you, or some of you, being the highest court of the said State in which decision could be had in the said suit between Edward C. Osborn and Joseph J. Slocum, as trustees of the Hastings and Dakota Railway Company, plaintiffs, (appellants in said Supreme Court of Minnesota), and Peter Froyseth, defendant, (respondent in said Supreme Court of Minnesota), wherein was drawn in question and involved the validity of a patent and statute or commission held and authority exercised under the United States; and the decision was against a title and right specially set up and claimed by the said Edward C. Osborn and Joseph J. Slocum, as Trustees of the Hastings and Dakota Railway Company, under the said statute, commission and authority, a manifest error hath happened to the great damage of the said Edward C. Osborn and

Joseph J. Slocum, as Trustees of the Hastings and Dakota Railway Company, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be herein given, that then under your seal, distinctly and openly you send the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 7th day of April, 1909, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court the 9th day of March in the year of our Lord one thousand nine hundred and nine.

[Seal of U. S. Circuit Court, Third Division, District of Minnesota.]

HENRY D. LANG,
Clerk of the United States Circuit Court for the District of Minnesota.
By LOUISE B. TROTT

Allowed by
CHARLES M. START,
Chief Justice.

e [Endorsed:] Original. State of Minnesota, Supreme Court. Edward C. Osborn, *et al.*, Trustees of the Hastings and Dakota Railway Company, plaintiffs in error, *vs.* Peter Froyseth, defendant in error. Writ of Error.

f THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Peter Froyseth, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington, on the 7th day of April, 1909, pursuant to a writ of error filed in the Clerk's office in the Supreme Court of the State of Minnesota, wherein Edward C. Osborn and Joseph J. Slocum, as trustees of the Hastings and Dakota Railway Company are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 9th day of March, 1909.

CHAS. M. START,
Chief Justice of the Supreme Court of Minnesota.

Attest:

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON, *Clerk,*
By I. T. CASWELL, *Deputy.*

Service of the within citation and receipt of a copy thereof admitted this 9th day of March, 1909.

C. A. FOSNES,
Solicitor for Peter Froyseth, Appellee and Respondent in Lower Court, Montevideo, Minn.

g [Endorsed:] Original. Supreme Court of the United States. Edward C. Osborn, *et al.*, Trustees of the Hastings and Dakota Railway Company, plaintiffs in error, *vs.* Peter Froyseth, defendant in error. Citation.

h STATE OF MINNESOTA,
Supreme Court:

EDWARD C. OSBORN and JOSEPH J. SLOCUM, as Trustees of the Hastings and Dakota Railway Company, Appellants,
vs.
PETER FROYSETH, Respondent.

The appellant in this action, (plaintiffs in the District Court), in connection with their petition for a writ of error, make the following assignment of errors, which they aver occurred upon the hearing of said cause in this court, to-wit:—

1. The court erred in rendering a judgment affirming the judgment herein by the District Court of the 12th Judicial District of the State of Minnesota in favor of the defendant in said District Court (respondent herein), and in adjudging that said respondent recover of said appellants their costs and disbursements, whereas the judgment of said District Court should have been reversed on account of the following errors occurring upon the trial of said cause in said District Court, viz.:

2. In holding that respondent's filing was refused by the local land officers solely on the ground that said land was withdrawn from settlement by the executive withdrawal of April 22, 1868.
Fol. 312, P. B.

3. In holding that the respondent is the owner of the land described in the complaint and ordering judgment accordingly.
Fol. 313, P. B.

4. In finding that the land in controversy was on October 23, 1891, free public land of the United States, subject to the jurisdiction of the United States Land Department, and has continued to be such, except as to rights then or since acquired by either party to this action.
Folio 303 P. B.

i 5. In holding that the Hastings and Dakota Railway Company did not acquire any right to the land in question by reason of its attempted selection of 1883.
Fol. 303.

6. In holding that the Hastings and Dakota Railway Company

did not acquire any right to the land in question by reason of its selection of October 29th, 1891. (Fol. 307, 313.)

7. That in receiving in evidence defendant's Exhibit 2, being a copy of Respondent's homestead application of November 3rd, 1891. Fol. 216.

8. In receiving in evidence Exhibit 3, being a letter of the Register of the local land office notifying respondent of the rejection of his application by the commissioner. (Fol. 225.)

9. In receiving Exhibit 4 in evidence, being a letter from the local land office in Marshall, Minnesota, notifying respondent of the decision of the Secretary of the Interior, affirming the decision of the Land Commissioners, relative to the land in question. (Fol 226.)

Dated March 9, 1909.

OWEN MORRIS,
Attorney for Appellants

j [Endorsed] State of Minnesota, Supreme Court. Edward C. Osborn, *et al.*, Trustees of the Hastings and Dakota Railway Company *vs.* Peter Froyseth. Assignments of error.

k STATE OF MINNESOTA,
Supreme Court, ss:

I, C. A. Pidgeon, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Assignment of Error in the cause therein entitled, as appears from the original, remaining on file in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom, and of the whole thereof.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul, this 10th day of March A. D. 1909.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON, *Clerk.*

l STATE OF MINNESOTA:

In Supreme Court, October Term, 1908.

EDWARD C. OSBORN and JOSEPH J. SLOCUM, as Trustees of the Hastings and Dakota Railway Company, Appellants,
vs.
PETER FROYSETH, Respondent.

Assignment of Errors.

I. The Court erred in holding that respondent's filing was refused by the local land officers solely on the ground that said land was withdrawn from settlement by the executive withdrawal of April 22nd, 1868.

II. The court erred in holding that the respondent is the owner

of the land described in the complaint, and ordering judgment accordingly.

m III. The court erred in finding that the land in controversy was on October 23rd, 1891, free public land of the United States subject to the jurisdiction of the United States Land Department and has continued to be such except as to rights then or since acquired by either party to this action.

IV. The court erred in holding that the Hastings and Dakota Railway Company did not acquire any right by reason of its attempted selection of 1883.

V. The court erred in holding that the Hastings and Dakota Railway Company did not acquire any right by reason of its selection of October 29, 1891.

VI. The court erred in receiving in evidence Defendant's Exhibit 2, being a copy of respondent's homestead application on November 3rd, 1891.

VII. The court erred in receiving in evidence Exhibit 3, being a letter from the Register of the local Land Office notifying respondent of the rejection of his application by the Commissioner.

VIII. The court erred in receiving Exhibit 4 in evidence, being a letter from the local Land office at Marshall notifying respondent of the decision of the Secretary of the Interior affirming the decision of the Land Commissioner.

n STATE OF MINNESOTA,
Supreme Court, ss:

I, C. A. Pidgeon, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Assignment of Error in State Supreme Court in the cause therein entitled, as appears from the original, remaining in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom, and of the whole thereof.

Witness my hand and seal of said Supreme Court at the Capitol in the city of St. Paul, this 10th day of March A. D. 1909.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON, *Clerk.*

1 STATE OF MINNESOTA:

In the Supreme Court, October Term, 1908.

STATE OF MINNESOTA:

District Court, County of Chippewa, Twelfth Judicial District.

RUSSELL SAGE, as Assignee in Trust of the Hastings & Dakota Ry. Co., Plaintiff,

vs.

PETER FROYSETH, Defendant.

Complaint.

Paragraph I.

For his amended complaint herein, the plaintiff alleges:

That the Hastings and Dakota Railway Company was duly incorporated under and by an act of the legislature of the Territory of Minnesota, entitled "An act to incorporate the Hastings, Minnesota River and Red River of the North Railroad Com-
2 pany," approved February 20th, 1857, as amended by an act of the legislature of the State of Minnesota, entitled "An act to amend an act entitled an act to incorporate the Hastings, Minnesota River and Red River Railroad Company, approved February 20, 1857," approved March 3rd, 1866, and an act of the legislature of the State of Minnesota, entitled "An act to amend an act entitled an act to amend an act entitled an act to incorporate the Hastings, Minnesota River and Red River Railroad Company, approved February 26th, 1857, and approved March 3rd, 1866," approved March 9th, 1867, and that its title as first above stated was duly adopted by resolution of its Board of Directors pursuant to the authority in and by said last named act conferred upon them.

II.

That on the 4th day of July, 1866, the Congress of the United States, by an act approved on that day, entitled "An act making an additional grant of lands to the State of Minnesota in alternate sections to aid in the construction of railroads," duly granted to the State of Minnesota for the purpose of aiding in the construction of a railroad from Hastings through the counties of Dakota, Scott, Carver and McLeod to such point on the western boundary of the state as the legislature of the state should determine, every alternate section of land designated by odd numbers to the amount of five alternate sections per mile on each side of said road, and not sold,
reserved or otherwise appropriated, or to which the right of
3 homestead or pre-emption had not attached, and that by said act it was also provided that the Secretary of the Interior should cause to be selected for said purpose from public unreserved land in Minnesota, within twenty miles of said road, so much land

in alternate sections or parts of sections, designated by odd number as should be equal to such lands as the United States had already reserved or otherwise appropriated, or to which the right of homestead or pre-emption settlement had attached as aforesaid. That said act further provided that the land should be subject to the disposal of the Legislature of the State of Minnesota for the purposes aforesaid and no other.

III.

That the legislature of the State of Minnesota, by an act approved March 7, 1867, entitled "An act to accept the grant, and in execution of the trust made and created in and by an act of Congress entitled 'an act making an additional grant of land to the State of Minnesota in alternate sections to aid in the construction of railroads in said state,' approved July 4, 1866," being Chapter 9, Special Laws of Minnesota, 1867, accepted the said land grant and granted all the said lands to the Hastings, Minnesota River and Red River of the North Railroad Company, which then was and until March, 1890, continued to be a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota, and had power to construct said line of road and receive said grant.

4 IV.

The said corporation duly accepted said grant and its name was thereafter as aforesaid duly changed to the Hastings & Dakota Railway Co., by virtue of the power and authority conferred upon it by the said act of the legislature of Minnesota, approved March 9, 1867. That said company duly surveyed and definitely located said line of road and caused a map thereof to be transmitted by the Governor of said state to the Secretary of the Interior, and that said map was duly approved by him and duly filed in his office on or about the 26th day of June, 1867, and said land grant has ever since been administered with reference to said definite location so shown by said map.

V.

That the time for the construction of said line of railroad was duly extended to 1882, by the Minnesota legislature by acts approved and entitled as follows: An act approved March 4, 1869, entitled "An act to extend to the Hastings & Dakota Railway Company, further time for the completion of a certain portion of their railway;" an act approved March 2, 1871, entitled "An act entitled an act to further extend the time for the completion of a certain portion of the Hastings & Dakota Railway, and to amend a certain act relating thereto," an act approved February 28, 1876, entitled "An act to extend the time for the completion of the unfinished line of railroad of the Hastings and Dakota Railroad Company;" an
5 act approved February 8, 1878, entitled "An act to extend the time for the completion of the unfinished line of railroad of the Hastings & Dakota Railroad Company," and that the time for the completion of this said line of road was so extended to and until the year 1882, and the said line of road was so constructed

to completion in the year 1880, and that such construction was accepted by the Governor of the State of Minnesota, and the Governor of Minnesota certified to the Secretary of the Interior in accordance with the provisions of Section Four of said act of Congress, approved July 4, 1866, at divers times prior to Jan. 1, 1881, as to each and every section of ten consecutive miles of said road, that the same was duly completed and due certification of such completion was duly made as to each and every mile of said road prior to Jan. 1, 1881.

That all that portion of the Hastings & Dakota Ry. west of range 10 were accepted on or before Jan. 28, 1880, and on that day the Governor of Minnesota duly certified the full completion and equipment of said road to the western boundary of Minnesota, and said certification and acceptance included and was of the portion of said road adjacent to and coterminous with the land herein described

VI.

That the Southeast quarter of Sec. 7, Tp. 119 of Range 40, Chippewa County, Minn., is more than ten miles and less than
6 twenty miles from said line of road as definitely located; and was on the 26th day of May, 1883, and has ever since been free and clear from any preemption or homestead claim thereto, and has never been sold, reserved or otherwise appropriated except as the rights of plaintiff and his predecessors have attached thereto

VII.

That the United States duly withdrew from settlement for the benefit of said grant on or about the 22nd day of April, 1868, all the land in odd numbered sections more than ten miles and less than twenty miles from said line of definite location; and on May 26, 1883, there was duly caused to be selected by the Secretary of the Interior and selected by said Hastings & Dakota Railway Co., for the benefit of said grant all the lands in said indemnity limits not theretofore reserved or excepted from the operation of the grant hereinbefore alleged. That said selections amounted to less than 70,000 acres, and that over 800,000 acres of the original grant and situate within 10 miles of the line of definite location of the line of said road had been theretofore sold, reserved or otherwise appropriated by the United States, or had the right of homestead or preemption settlement attached to them prior to the passage of the act making said grant, and that all the lands in the indemnity limits subject to selection were insufficient to fill the losses in the primary limits by over 800,000 acres.

7 VIII

That the Hastings & Dakota Railway Company, at the time of the presentation of the said selections to the proper officers of the Interior Department of the United States duly tendered the requisite fees to the proper officers for the filing and subsequent action upon said selections, and also duly tendered full lists of lands lost showing for what tracts in the primary limits of said grant the indemnity selections were made.

IX.

That the tract of land hereinbefore described was, in the year 1883, and at the time of said selection, and at the time of its re-selection on October 29th, 1891, free public land which the United States had not sold, reserved or otherwise appropriated, and to which the right of homestead or pre-emption settlement had not attached.

X.

That said Railway Company constructed and had duly completed its said entire line of railway within the time and in the manner prescribed by law, and had the same so completed prior to the 1st day of January, 1889. That in *quo warranto* proceedings instituted to forfeit the franchise of the Hastings & Dakota Ry. Co., a judgment was duly given and made on the 23rd day of March, 1886, by the Supreme Court of the State of Minnesota, and that thereby the said franchises were forfeited, and the said company dis-
8 solved subject to the statutory period of three years allowed to the company to dispose of its property and wind up its affairs, but with express recognition of the right of the company to its land grant as earned by the construction of the road.

XI.

That on December 9th, 1889, without fault or neglect on its part the said company was unable to dispose (otherwise than as hereinafter stated) of all its property and wind up its affairs within the three years provided by statute for so doing, and on that day it duly sold, assigned, conveyed and transferred to this plaintiff in trust for the benefit of the stockholders of said company, all of its property rights and assets, including its land grant not theretofore disposed of, and including the tract of land described in this complaint and all right it had and claimed thereto and to conveyances of any of said lands from the State of Minnesota or from the United States and all right to assert, prosecute and maintain all claims and actions, both in the courts and in the departments and offices of the United States, in relation thereto, and to sell and convey all lands received by him as such trustee and distribute the proceeds thereof among the stockholders of said company, according to their respective rights thereto; and that this plaintiff has duly accepted said trust, and is acting as such trustee.

XII.

That by reason of certain objections made to the selections
9 of 1883, this plaintiff, without admitting the validity of such objections and without waiving any rights gained by said Railway Company under its said selections of 1883, caused a re-selection to be made of the same lands which had been made in 1883, as aforesaid, and for the same purpose as the selections of 1883, heretofore referred to, and the said re-selections were made on October 29, 1891, and the tract of land described in this complaint was duly re-selected by plaintiff on said last mentioned date. That

thereafter certain of the tracts selected in 1883 and re-selected in 1891 as aforesaid and, among them the tract described in this complaint were duly certified by the Secretary of the Interior to the State of Minnesota, in compliance with and for the purposes of the said act of July 4, 1866, and said list was, on June 18, 1900, duly submitted to and approved by the Secretary of the Interior and the lands therein contained included the tract described in this complaint and said certification was, and was therein stated to be, for the benefit of plaintiff, as the trustee of the Hastings & Dakota Ry. Co.

XIII.

That the plaintiff is and ever since the 28th day of June, 1900, prior to which time the certificate hereinbefore mentioned was executed and delivered to the Governor of the State of Minnesota and filed with the Auditor thereof, has been the owner and entitled to the immediate possession of the tract of land described in this com-
plaint and that the defendant prior to said day wrongfully
10 and unlawfully entered into the possession of said premises and real estate, and now is, and ever since his said unlawful entry without right or title has been, in the wrongful and unlawful possession thereof, and has wrongfully and unlawfully withheld and still withholds the same from the plaintiff. That the value of the rents and profits of the said land for and during the time that the same have been so wrongfully and unlawfully withheld from this plaintiff is the sum of $200.

Wherefore, the plaintiff demands judgment against defendant for the restitution of the land and premises herein mentioned, and for said damages, and for the costs and disbursements of this action.

LYNDON A. SMITH,
Attorney for Plaintiff, Montevideo, Minn.

(Title.)

Answer.

First.

The defendant for his amended answer admits the matters alleged in the first paragraph of the complaint.

Second.

Defendant denies that the time for the construction of said railroad was ever extended, as claimed in paragraph five of said com-
plaint, and denies that said railroad was constructed within
11 the time limited by the Congressional grant of July 4th, 1866, or the collateral grant made by the legislature of the state of Minnesota, under chapter 9 of the special laws of said state for the year 1867, whereby said Congressional grant was transferred to said Hastings & Dakota Railway Company. Defendant admits that by the various acts referred to in said paragraph five of the complaint the legislature of the state of Minnesota attempted to extend

the time for the completion of said road as therein alleged, but denies that the legislature of said state had any power from Congress or otherwise to extend the time limit for said construction, as declared in said Congressional grant.

Third.

Defendant admits that the land described in the complaint is more than ten miles, and less than twenty miles, from the line of said railroad as so definitely located, as alleged in paragraph six of said complaint, but denies all of the other allegations of said paragraph

Fourth.

Defendant also admits that on or about April 22nd, 1868, all the land in odd numbered sections within the limits of said indemnity grant was withdrawn from settlement, so far as such withdrawal could be effected by the *ex parte* direction of the Commissioner of the General Land Office, but denies that said order of withdrawal was valid or effectual to prevent the attachment to said land of the right of this defendant as a homestead claimant, as hereinafter set
12 forth, and defendant alleges further in that behalf that said order of withdrawal so made by the commissioner of the general land office as aforesaid was expressly revoked and annulled by direction of the Secretary of the Interior, on or about May 26th, 1891.

Fifth.

Defendant further denies that on May 26th, 1883, or at any other time, there was duly selected or caused to be selected by the Secretary of the Interior, or by said Hastings & Dakota Railway Company all or any of the lands within said indemnity limits not therefore reserved or excepted from the operation of said grant, as alleged in paragraph seven of said complaint, and denies that at any time either before or since that date the Secretary of the Interior in any manner, either directly or indirectly, advised, participated in, countenanced or approved any selection of the lands described in the complaint by said Hastings & Dakota Railway Company, or by the plaintiff in this action; and on the contrary thereof alleges that on or about May 26th, 1883, as defendant is informed and believes, said Hastings & Dakota Railway Company made an entirely imperfect, insufficient and unwarranted attempt to select the lands within said indemnity limits of said grant, and that in said attempted selection neither said Secretary of the Interior nor any other officer of the United States co-operated or in any manner participated; that said attempted selection did not conform to the rules and re-
13 quirements prescribed by the Secretary of the Interior, and then in force as to the method of making indemnity selections by and on behalf of land grant railway companies; that no specification of losses of any lands within said indemnity limits were sought to be taken was furnished by said company; that no showing was made in connection with said attempted selection that any of the lands within said place limits had been lost; that at that time there had been no computation or ascertainment of said losses in the

place limits of said grant by the Interior Department. And defendant further denies that said Hastings & Dakota Railway Company tendered any fees to said Land Officers to cover their proper charges for the examination and entry by said officers of said selections, as alleged in paragraph eight of said complaint, or otherwise.

Sixth.

Defendant further alleges that thereafter, on the 23rd day of October, 1891, said attempted selection by said Hastings & Dakota Railway Company was duly taken up and considered by the Secretary of the Interior and the same was on said date by said Secretary of the Interior rejected, disapproved and cancelled for its numerous imperfections and insufficiencies.

Seventh.

Defendant denies that the said Hastings & Dakota Railway Company constructed or completed its line of road within the time or in the manner provided by law, as alleged in paragraph ten
11 in said complaint, or that it ever constructed or completed the line of said road at all west of the village of Glencoe, in the county of McLeod, in said state, either as alleged in said paragraph numbered ten of the complaint or otherwise; on the contrary defendant alleges, on information and belief, that on or about July 1st, 1872, after said Hastings & Dakota Railway Company had constructed its said line of railway from Hastings in said state to said village of Glencoe, in the county of McLeod, in said state, a point about 100 miles east of the point in said railroad opposite to the land described in the complaint, said Hastings & Dakota Railway Company, in violation of its charter, and in violation of the act of the legislature of said state by which said land grant was transferred to it, sold its said line of railway as constructed to said Glencoe, and projected to the city of Ortonville, at the foot of Big Stone lake, the ultimate western terminus thereof, to the railroad company organized under the laws of the state of Wisconsin, then known as the Milwaukee & St. Paul Railway Company, now known as the Chicago, Milwaukee & St. Paul Railway Company, and that said road was built from said Glencoe to the said city of Ortonville by said Milwaukee & St. Paul Railway Company, and not by said Hastings & Dakota Railway Company, and that said Hastings & Dakota Railway Company retained a nominal connection with said construction of said line of road, after the said sale thereof, solely for the fraudulent purpose of claiming from the state of Minnesota, and
15 from the United States, the lands included in said land grant above the line of said road from said village of Glencoe to the said city of Ortonville, a distance of about 120 miles, which said Hastings & Dakota Railway Company would rightfully have been entitled to had it constructed said railway in the time and manner provided by said grant, but which lands it forfeited and lost by reason of its failure to comply with said grant, and by its failure to build said road at all.

Eighth.

Defendant admits that as alleged in said paragraph ten of the complaint in quo-warranto proceedings in Supreme Court of the State of Minnesota, the judgment of said court was duly given and entered on the 23rd day of March, 1887, forfeiting the charter and all the corporate rights, franchises and privileges of said Hastings & Dakota Railway Company because of its violation and non-user of its said corporate franchises; but denies that any question as to the rights of said company to any portion of said land grant was involved in said quo-warranto proceedings either directly or indirectly, or that any decision was made therein with reference to the same, as in that behalf alleged in said complaint, but admits that the cancellation of said corporate franchise was subject to the three statutory period allowed to Minnesota corporations whose charters are forfeited within which to wind up their affairs. Defendant further alleges that said Hastings & Dakota Railway Company never applied to any district or other court of said state for the appointment of a receiver
16 to continue the process of winding up its affairs after the expiration of said statutory three years, and for want of the appointment of such receiver said corporation entirely ceased to exist, and all of its property rights terminated on March 23rd, 1890.

Ninth.

Defendant admits that on or about December 9th, 1889, and within the three years allowed to said corporation by law to wind up its affairs, it assigned to Russell Sage, as trustee, all of its property, including all of its rights to said land grant, including the lands in place and within said indemnity limits; but defendant alleges that all the right said corporation then had or possessed to the lands within said indemnity grant, including the land in controversy in this action, was whatever right arose out of said imperfect and insufficient selection thereof made by said company on said May 26th, 1883, which selection was then pending, undecided, before the said Secretary of the Interior, which said selection was as aforesaid afterwards cancelled and rejected on October 23rd, 1891, by said Secretary of the Interior.

Tenth.

Defendant admits that after the rejection and cancellation by said Secretary of the Interior on October 23rd, 1891, of said selection of May 26th, 1883, made on behalf of said Hastings & Dakota Railway Company, said Russell Sage, on October 29th, 1891, pretending to act by virtue of some authority conferred on
17 him by said Hastings & Dakota Railway Company, which was then entirely defunct, by reason of the assignment to him on December 9th, 1889, of its property in trust as aforesaid, made a new pretended selection of all of the lands within the said indemnity limits of said grant, which last pretended selection, defendant alleges, was entirely nugatory because of said prior dissolution and complete termination of said Hastings & Dakota Railway

Company, which corporation alone, during its existence, possessed the right to initiate a claim to said land by selection of the same to make up for lands lost in place. Defendant further alleges that said last named pretended selection of said lands was, as to the lands described in the complaint herein, never recognized as valid, and was never approved, but on the contrary said last mentioned selection was as to the lands involved herein expressly disapproved and disallowed by the Secretary of the Interior.

Eleventh.

Defendant further answering alleges that he is and at all times since July, 1891, he has been a citizen of the United States, and as such was fully qualified to make a homestead entry upon any of the free public lands of the United States subject to the operation of the homestead laws of the United States; that at all times mentioned in the complaint and answer the land described in complaint was free public lands of the United States, which had not been sold, reserved or otherwise appropriated, but which during all of said time
18 was subject to entry by any qualified homestead claimant.
That prior to the year 1891 the defendant entered upon the tract of land described in the complaint with the intent in good faith to make entry thereof as a government homestead under the United States homestead laws, being advised that whatever claim had theretofore existed to said land in favor of said Hastings & Dakota Railway Company was or would soon be entirely extinguished, and that there would then be nothing in the way of the allowance of his homestead entry therefor in the United States Land Office. That at the time of said settlement thereon defendant constructed thereon a house, barn and other buildings and improvements reasonably worth and of the value of One Thousand Dollars ($1,000.00) and then and there established his residence thereon, which he has continued without interruption since. That the defendant duly offered a homestead application for said land in due form of law at the proper local United States Land Office, accompanied by the tender of all necessary fees, but that the same was disallowed on the pretended claim that it had been selected as indemnity lands by the Hastings & Dakota Railway Company; that said pretended selection was void and of no effect, and that the rejection of his homestead application was erroneous. That the defendant before any rights of said Railway Company had attached to said land made repeated applications for homestead entry thereon. That the defendant has always maintained and still maintains that he has a right to
19 enter said land as a homestead, and that the plaintiff has no right, title or interest there thereon, but that the defendant's rights are superior.

Twelfth.

Further answering the defendant denies each and every other allegation contained in the complainant.

Wherefore, defendant asks that the plaintiff takes nothing by this

action, but that plaintiff's complaint be dismissed, and that the defendant recovers his costs and disbursements herein.

C. A. FOSNES,
Attorney for Defendant.

(Reply—General Denial.)

(Title.)

Settled Case.

This cause was called for trial at 11 A. M., March 22, 1907, at the court house in the Village of Montevideo, Minnesota, before Hon. Gorham Powers, Judge.

L. A. Smith appeared as attorney for the plaintiffs.

C. A. Fosnes appeared as attorney for defendant.

By consent of parties, PETER FROYSETH, the defendant, was called in his own behalf and sworn.

Nels Iverson was called and sworn to act as interpreter.

20 Direct examination.

By Mr. FOSNES.

Q. Where do you live, Mr. Froyseth?
A. Section seven, Town of Maudt.
Q. What quarter?
A. Southeast quarter?
Q. When did you first settle there?
A. 1889, the 15th of May.
Q. Have you lived there ever since on that land?
A. Yes.
Q. You are a married man?
A. Yes.
Q. Were you married when you settled on that land?
A. Yes.
Q. Has your family lived there with you ever since?
A. Yes.
Q. Have you ever been off that land, ever since?
A. No.
Q. And you have been trying to get that as a homestead, haven't you?

Objected to as leading.

Q. Have you been trying to get that as a homestead?

Objected to as leading.
Objection overruled.

A. Yes.
Q. Has there been anyone else that has lived on the farm, or worked any part of it, since that time?

A. No.

Q. How much is there plowed on the land, broke?

Objected to as irrelevant and inadmissible.

Objection overruled.

Exception.

A. 130 acres.

It is admitted by the parties that this quarter section that is in question is the southeast quarter of section 7, town 119, range 40, Town of Mandt, Chippewa County, Minnesota.

Cross-examination.

By Mr. SMITH:

Q. What did you do on this land in 1889?

A. I settled on it and built a house on it.

Q. What do you mean by settling on it?

A. Take it as my home.

Q. What did you do.

Plaintiffs move to have that answer stricken out as a conclusion.

Motion denied.

A. I commenced to break on it and work it as a farm.

Q. How much did you break either that year or the next year, the next two years?

A. I broke about ten acres the first year and about 15 the second year.

Q. Where were you born?

A. In Norway.

Q. How many acres did you plow up the third year—how much did you break up the third year?

A. I can't state exactly year by year about that, it was one year I broke 26 acres, but I think that was later than the third year.

Q. What did you do with the rest of the land in 1889 and 1890; the first two years you were there?

A. I cut some hay on it, as I had my cattle on it.

Q. How many cattle did you have?

A. I had a pair of oxen and how many other cattle I had I cannot remember.

Q. How old were you when you came to this country?

A. I can't remember that now.

Q. How old are you now?

A. 58 years. I have been here 21 years.

Q. And you have lived on that land all the time since you moved there in 1889, is that correct?

A. No, I never have been off from my family.

Q. How does he know that it is 1889 that he came there; how does he fix the year in his mind?

A. Yes, I know that as the date, as people generally follow years.

Q. Haven't you any particular fact by which you can tell what year it was when you went on there?

A. I lived on a farm a mile and a half from Montevideo and I moved from that and on this at this time.

Q. Where was the farm a mile and a half from Montevideo where he lived?

A. They call it the Roli farm; he rented the house and worked for Knute Lien; and on the railroad track at times.

23 Q. Have you lived anywhere else in the town of Mandt except on the southeast quarter of section seven?

A. No.

Q. You went right from the Roli farm down here by Rock Cut straight up to this quarter section that you are living on now?

A. Yes.

Q. Did you vote when you were down here?

A. Yes.

Q. Didn't you vote the first year you was up in Mandt?

A. No.

Q. Do you remember which year you voted first in the town of Mandt?

A. No.

Redirect examination.

By Mr. FOSNES:

Q. Do you remember when you took out your first paper. Did you take out your first paper before you left the Roli farm?

A. Yes.

This trial continued until March 25, at 4 P. M., 1907.

Trial resumed at Montevideo, the parties appearing by their respective attorneys, as first mentioned.

Plaintiff offers in evidence their Exhibit "A," which is a certified copy of an act to incorporate the Hastings, Minnesota River and Red River of the North Railroad Company; act approved February 20, 1857.

24 No objection.

Plaintiffs offer in evidence their Exhibit "B," which is a duly certified copy of Chapter 9, Special Laws of Minnesota for 1867, an act to accept the grant, and in execution of the trust made and created in and by an Act of Congress entitled "An Act making an additional grant of lands to the State of Minnesota in alternate sections to aid in the construction of railroads in said state." Approved July 4, 1866. Said law approved March 7, 1867.

No objection.

Exhibit "C," offered in evidence by plaintiffs, which is a part of Chapter 14 of the Special Laws of Minnesota for 1867, approved March 9, 1867, same being a certified copy of "An Act permitting the change of name of the Hastings, Minnesota River and Red River of the North Railway Company, etc."

No objection.

Plaintiffs offer their Exhibit "D," in evidence, which is a resolution changing the name to the Hasting & Dakota Railway Company, and accepting the grant referred to in the previous exhibits.

No objection.

Exhibit "E" offered in evidence by plaintiffs, which is a duly certified copy of a letter of the Commissioner of the General Land Office withdrawing all land within 20 miles of the supposed line of the Hastings & Dakota Railway Company.

No objections.

Plaintiffs offer their Exhibit "F" in evidence, which is a
25 certified copy of a map of definite location of the Hastings & Dakota Railway Company; offered together with the endorsements thereon.

Defendant objects to this on the ground same is not properly authenticated.

Objection overruled.

Exception.

Plaintiffs offer their Exhibit "G" in evidence, which is a duly certified copy of a letter of June 26, 1867, by the acting Secretary of the Interior, enclosing the map offered here as Exhibit "F," and directed to the Commissioner of the General Land Office.

Same objection as last.

Same ruling.

Exception.

Plaintiffs offer in evidence Exhibit "H," which is a duly certified copy of the map of general administration of the Hastings & Dakota land grant, showing the land in question to be within the indemnity limits thereof.

Same objection.

Same ruling and exception.

Plaintiffs offer their Exhibit "I" in evidence, which is a duly certified copy of a letter of the Commissioner of the General Land Office to the Register and Receiver at the Greenleaf, Minnesota, Land Office, and determining and fixing the limits of the H. & D. grant as shown on the map of administration.

Same objection.

Same ruling and exception.

26 Plaintiffs offer their Exhibit "J," which is a duly certified copy of four certificates of the Governor of Minnesota, issued February 18, 1871, June 2nd, 1873, January 10, 1879, and January 10, 1880, showing the construction and completion by the Hastings & Dakota Railway Company from its initial to its terminal point.

Same objection.

Same ruling and exception.

Plaintiffs offer their Exhibit "K," in evidence, which is a duly certified copy of a resolution of the Hastings & Dakota Railway Company accepting the extension of time for the completion of the road, granted by the State of Minnesota, being an Act approved February 8, 1878.

Same objection.

Same ruling, exception.

Plaintiffs offer their Exhibit "L," which is a duly certified copy of the trust deed of the land grant of the Hastings & Dakota Railway Company to Russell Sage, dated December 9, 1889.

Same objection.

Same ruling, exception.

Plaintiffs offer their Exhibit "M" in evidence, which is a duly certified copy of a list of lands selected in the Marshall District for the benefit of the Hastings & Dakota Railway Company, dated October 29, 1891.

Same objection.

Overruled, and exception.

27 Plaintiffs offer in evidence their Exhibit "N," which is a duly certified copy of certification to Russell Sage of the land in question by the General Land Office, which certification is approved by the Secretary of the Interior on June 18, 1900.

Same objection.

Same rulings and exception.

Plaintiffs offer in evidence their Exhibit "O," which is a duly certified copy of order and decree of the District Court of Ramsey County, Minnesota, designating Joseph J. Slocum and Edward C. Osborn as trustees in place of Russell Sage, deceased, under the terms and conditions of the trust created and imposed on him by plaintiffs' Exhibit "L."

Defendant objects on the same ground; on the further ground that the court had no authority to order the substitution, and on the ground that there could be no perpetuation of the trust by the appointment of new trustees; the time for completion of the trust having expired long before the appointment of these plaintiffs.

Objection overruled, exception.

It is stipulated and agreed by the parties that the defendant has been in the possession of this land since May 18, 1901, and that the value of such use, if the title be found in plaintiffs, is to be deemed to be the sum of $320 from that time until the day of the trial.

Plaintiffs rest.

28 Defendant offers in evidence Exhibit "1," which is a duly certified copy of the defendant's declaration of intention to become a citizen of the United States, made November 1st, 1888.

No objection.

ELIAS JACOBSON, called by defendant and sworn, examined by Mr. Fosnes as follows:

Q. Mr. Jacobson, you are the clerk of court here?

A. I am.

Q. I show you Exhibit "1;" did you see a person, the defendant in the case who was here and testified Saturday?

A. I did.

Q. State whether or not that is his paper?

A. This is the paper, or the certified copy of

Q. Whether the defendant is the same person mentioned in Exhibit "1" as Peter Nels Froyseth?

A. Peter Nels Froyseth is the same party that testified as defendant in this case last Saturday.

COURT: Were you the clerk of the District Court of Chippewa County at the time this Exhibit "1" was taken out?

A. I was.

Defendant offers in evidence Exhibit "2," which is a duly certified copy of the defendant's application for a homestead entry on the land in question, with affidavit, made at the Marshall Land office on November 3, 1891.

Objected to as irrelevant and immaterial.

Objection overruled, exception.

Mr. SMITH: The particular point is that his application was made after the selection of the land by the Hastings & Dakota Railroad Company.

Defendant offers in evidence Exhibit "3," a letter of the General Land Office at Marshall, Minnesota, dated October 25, 1894, notifying him of the rejection of this application by the Commissioner of the General Land Office.

Plaintiffs object as irrelevant and immaterial, not properly identified, and no foundation laid.

Elias Jacobson was called to the stand, and examined by Mr. Fosnes as follows:

Q. Mr. Jacobson, do you know the signature of Mr. Shephard, the Register of the Land Office?

A. C. P. Shephard?

Q. Yes.

A. Yes, sir.

Q. You may look at Exhibit 3 and state whether that is his signature?

A. It is the way it used to be at that time. I haven't seen it in the last years, but I was well acquainted with him up to six eight years ago.

Q. How is it about Exhibit four?

A. That is his signature.

Exhibit 3 re-offered in evidence.

Objected to as irrelevant and immaterial.

Objection overruled, exception.

Exhibit four offered in evidence by defendant, being the letter from the Land Office at Marshall notifying him of the affirmance of the decision of the General Office by the Secretary of the Interior.

Same objection and not the best evidence.

Objection overruled, exception.

Defendant offers in evidence page 550, of Volume two, of the Naturalization Records of Chippewa County, dated 9th of June, 1897, being the citizen papers of the defendant.

No objection.

Adjournment until 9 o'clock, March 26, 1907, in forenoon.

C. A. FOSNES, called by defendant and sworn.

Witness states as follows:

A. I will say that the defendant is the party who, on November 3, 1891, made application for homestead entry on the southeast of 7, 119, 40, as shown by Exhibit 2, and that the defendant has made no application for homestead entry on any other tract of land

Cross-examination.

By Mr. SMITH:

Q. Were you the attorney for the defendant at the time that he made the application in November, 1891?

A. I was the attorney in appeals. I wasn't at the time he made the application. I didn't know of it; but he appealed from the refusal of the Commissioner of the General Land Office, and from there to the Secretary of the Interior.

31 Q. You took the appeal yourself?

A. I took the appeal myself—well, he signed the appeals. I wasn't attorney of record, he signed the appeals personally, but I made them out for him.

The COURT. And you were the attorney that advised him in the matter?

A. Yes.

Defendant introduces in evidence a certified copy of the decision of the Secretary of the Interior invalidating the land grant in question, made on May 22, 1891, revoking the indemnity withdrawals of the Hastings & Dakota Railway Company.

(Not marked, papers not in court.)

Objected to as irrelevant and immaterial.

Objection overruled, exception.

And also that of the Secretary of the Interior introduced in evidence, of October 23, 1891, revoking the indemnity withdrawals.

(Not marked, papers not in court.)

No objection.

Defendant rests.

Plaintiffs offer in evidence Exhibit "P," which is a duly certified copy of a letter of instructions of the Secretary of the Interior to the Commissioner of the General Land Office, directing that the decision of May 22, 1891, in evidence here as Exhibit 5, did not apply to cases on appeal.

Objected to as immaterial.

Objection overruled.

32 Exhibit "Q," with indorsements, offered in evidence by plaintiffs, being a duly certified copy of a list of lands selected by them May 26, 1883, including the land in question in this case.

Objected to as not proper rebuttal, incompetent and immaterial.

Objection overruled, exception.

Exhibit "R" offered in evidence by plaintiffs, which is a duly certified copy of the report of the Register and Receiver of the U. S. Land Office at Benson of the selection already offered in evidence, together with their rejection of said selections and the appeal of the Hastings & Dakota Railway Company from that rejection of those selections.

Same objections as last above.

Objection overruled, exception.

Exhibit "S" offered in evidence by plaintiffs, being a duly certified copy of the letter of the transmissal of the appeal and papers

constituting Exhibit "R," by the Register and Receiver of the U. S. Land Office at Benson to the General Land Office at Washington.

Same objection as last, same ruling and exception.

Plaintiffs offer their Exhibit "F," which is a duly certified copy of the official record of adjustment of the land grant of the Hastings & Dakota Railway Company, under the deficiencies of that grant.

Same objection, same ruling and exception.

Both parties rest.

33 EXHIBIT "E."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *July* 12, 1866.

Register and Receiver, Greenleaf, Minn.

GENTLEMEN: I enclose herewith a diagram showing the designated line of route and the ten and twenty mile limits of the Hastings, Minnesota River and Red River of the North Railroad, for which a grant of lands is made to the State of Minnesota by the Act of Congress, approved July 4th, 1866.

The grant is for five alternate sections per mile designated by odd numbers, with the right of indemnity for land disposed of, from odd sections within 20 miles of the road, excepting, however, from the grant "any and all lands heretofore reserved to the United States by any Act of Congress, or in any other manner by competent authority for the purposes of aiding in any object of internal improvement or other purpose whatever," except the right of way where the titles is in the U. S.

The even or reserved sections within the ten mile limits are increased in price to $2.50 per acre, and cannot be sold at private entry until after they have been first offered at that price. Pre-emption settlers upon compliance with the law, may, however, pay for such sections at the increased price, and 80 acres may be entered under the Homestead Law.

In compliance with the instructions from the Secretary
34 of the Interior of the 11th inst., you are hereby directed to withhold from sale and location, pre-emption settlement and homestead entry, both the odd and even sections within the ten mile limits, and the odd sections within the 20 mile limits, as hereinafter mentioned.

The odd sections within both limits are absolutely withdrawn, and the even sections will only be subject to settlement and entry under the pre-emption and homestead laws at $2.50 per acre, except in cases where legal inceptive rights had accrued to settlers under the pre-emption laws prior to the receipt of this order by you. In such cases, the settlers, by the decision of the Secretary of the Interior of the 22nd ult., will upon compliance with that law be allowed to pay for his claim at $1.25 per acre.

This grant excepts from its provisions any lands reserved or granted prior to its passage, giving only the "right of way" where the title still remains in the U. S. Therefore, all odd sections of

land within the limits of this road which fell within the limits of any antecedent grant or reservation are excepted and excluded.

Diagrams showing the limits of prior grants for railroads are now in your office.

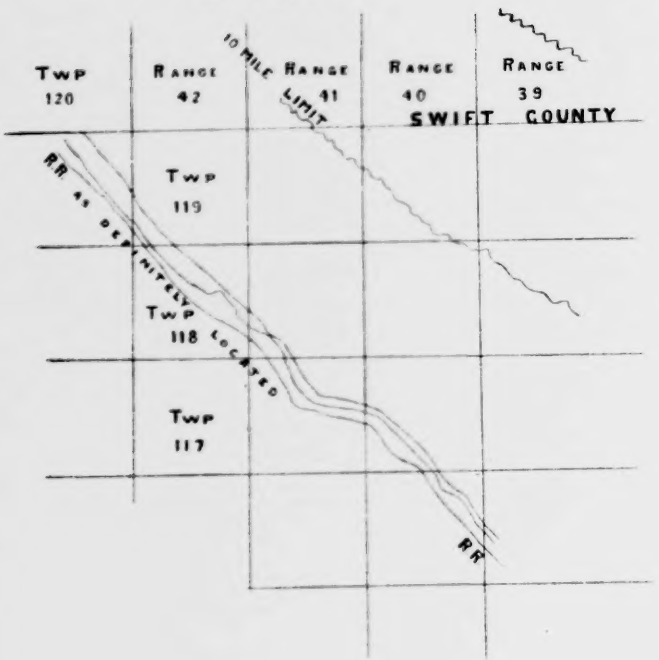
This order will take effect from the date of its reception at your office, and you will advise me of the precise time it may be received by you.

Very respectfully, your ob't serv't.

J. M. EDMUNDS,
Commissioner.

(Here follows diagram marked p. 35.)

EXHIBIT "F"



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v.
Troyseth
p. 35

35 PART OF EXHIBIT "F."

Map of the Hastings, Minnesota River and Red River Railroad of the North, as Surveyed and Located, August–October, 1866.

Scale, 5280 ft., or 1 mile to 1 inch.

I, William R. Marshall, Governor of the State of Minnesota, do hereby certify that this map of the Hastings, Minnesota River and Red River of the North Railroad, has been duly filed in my office by the Railroad Company, and shows in connection with the public surveys the location of the line of route of said railroad, as actually surveyed from Hastings through the counties of Dakota, Scott, Carver and McLeod, to a point one mile south of the foot of Big Stone Lake, on the western boundary of the state, as definitely fixed in compliance with the act of Congress, approved July 1th, 1866, entitled "An act making an additional grant of lands to the State of Minnesota in alternate sections to aid in the construction of railroads in said state, and with the Act of the Legislative Assembly of the State of Minnesota entitled "An Act to amend an Act entitled "An act to incorporate the Hastings, Minnesota River and Red River Railroad Company, approved Feb. 20, 1857, approved March 3, 1865

(Inter. revenue, Jan. 1, 1867.)

In testimony whereof, I have hereunto set my hand and
36 caused to be affixed the great seal of the State. Done at Saint Paul, Minn., this 1th day of January, A. D. 1867.

WM. R. MARSHALL.

W. C. ROGERS,
Sec. of State. [SEAL.]

Plotted and drawn by A. J. Hill, St. Paul, Minn.

Endorsements.

1888
26886

Decision of Secretary.
See letter of Com'r L. L. O., dated April 4, '67, submitting this map, with letter of Gov. of Minnesota, accompg same.
Hastings, Minn., R. & Red River Railroad.
Map of definite location, map 2, tube 21.
Filed in Gen. Land Office June 26, 1867.

PART OF EXHIBIT "F."

STATE OF MINNESOTA,
County of Ramsey, ss:

Gates A. Johnson, of St. Paul, in said county and state, being duly sworn, deposeth and says that he is the chief engineer of the Hastings, Minnesota River and Red River of the North Railroad, and has been such chief engineer since the 4th day of August, 1866; that during the period above named D. McKenzie and L. L. L. Bossford were employed by this deponent chief engineer for said rail-
37 road company, as deputy or division engineers; that the said engineers did actually survey and mark upon the ground the line or route of the said railroad from a point on the western boundary of the State of Minnesota, one mile due south of the outlet of Big Stone Lake, to the City of Hastings in said state, in the sections and at the times respectively designated by dates, which are included between the flag-staffs upon and along the line of route of said railroad as delineated on this map, showing the lines of the public survey in connection with the surveyed line of the route; and that the acts of said deputy or division engineers in the premises are duly approved and accepted on behalf of said company by this deponent as said chief engineer of the Hastings, Minnesota River and Red River of the North Railroad.

(Inter. revenue, Jan. 1, 1867.)

GATES A. JOHNSON,
Chief Engineer.

Sworn and subscribed this 4th day of January, 1867, before me.
[SEAL.] PENNOCK PUSEY,
Notary Public.

Office of the Hastings, Minnesota River & Red River of the North Railroad Company.

HASTINGS, MINN., *Jan. 4th*, 1867.

It is hereby certified that this map shows, in connection with the public surveys, the actually surveyed line of route of the
38 Hastings, Minnesota River and Red River of the North Railroad from the city of Hastings to the western boundary of the State of Minnesota, as definitely fixed, in compliance with the act of Congress, approved July 4th, 1866, and in pursuance of the resolution of the board of directors of said railroad passed on the 4th day of August, 1866; and that the dates of the field work thereof are truly indicated along the line, from station to station, upon this map.

In Testimony Whereof, the Hastings, Minnesota River and Red River of the North Railroad Company has hereunto attached its corporate seal and caused the same to be signed by the President and Chief Engineer, at Hastings in the day and year first above written.

WM. G. LEDUC, *President.*

Attest:

W. K. ROGERS, *Secretary.*
GATES A. JOHNSON,
Chief Engineer.

(Hastings, Minn. Riv. & Red. Riv. of the North R. R. Co.)
(Inter. revenue, Jan. 4, 1866.)

Endorsement: Map 2. Tube 21. Hastings, Minn. R. & Red River Railroad.

EXHIBIT "G."

(4—207.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *December* 3, 1894.

I, S. A. Lamoreux, Commissioner of the General Land
39 Office hereby certify that the annexed copy of a letter dated June 26, 1867, and signed W. T. Otto, acting secretary, is a true and literal exemplification of the original on file in this office.

In Testimony Whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] S. W. LAMOREUX,
Commissioner of General Land Office.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *June 26th*, 1867.

SIR: Herewith I enclose a map, duly certified, representing the location of the Hastings, Minnesota River and Red River of the North Railroad, as definitely fixed in accordance with an act of Congress entitled "An act making an additional Grant of Lands to the State of Minnesota, in alternate sections, to aid in the construction of railroads in said State," approved July 4th, 1866, Stat. Vol. 14, page 87, and the act of the State Legislature, approved March 7, 1867, accepting the grant, etc.

The grant is subject, however, among others, to the conditions and limitations contained in the last proviso to the 1st Section of the said Act of Congress.

The map is accepted as the definite location of the road. It
40 will be placed on file in your office as the basis for the adjustment of the land grant.

The lands falling to the grant should be withdrawn, and any lands heretofore withdrawn on account of this road which may now fall outside of the limits of the grant should be restored to the condition they were in prior to such withdrawal. I also enclose a certified copy of the Act of the State Legislature before referred to.

Very respectfully,
Your obt. servant,

W. T. OTTO,
Acting Secretary.

Hon. Jos. S. Wilson, Commissioner of the General Land Office.

EXHIBIT "I."

F. E. L. S. M. L. 140295-1903.

DEPARTMENT OF THE INTERIOR.
GENERAL LAND OFFICE.
WASHINGTON, D. C., *June* 5, 1903.

I, J. H. Fimple, Act. Commissioner of the General Land Office, do hereby certify that the annexed copy of the letter from the Commissioner of the General Land Office to the Register and Receiver, Greenleaf, Minnesota, dated April 22, 1868, is a true and literal exemplification from the records of this office.

In Testimony Whereof, I have hereunto subscribed my
41 name and caused the seal of this office to be affixed at the city of Washington, on the day and year above written.

[Land Office Seal.]

J. H. FIMPLE,
Acting Commissioner of the General Land Office.

EXHIBIT "I."

DEPARTMENT OF THE INTERIOR.
GENERAL LAND OFFICE, *April* 22, 1868.

Register & Receiver, Greenleaf, Minn.

GENTLEMEN: Under date of 12th July, 1866, this office transmitted to you a diagram showing the designated line of route and the 10 and 20 mile limits of the Hastings, Minnesota River and Red River of the North Railroad, and directed the withdrawal of all the odd numbered sections within those limits not heretofore withdrawn for any other grant. The even sections within the 10 mile limits were directed to be withdrawn from private entry, but were left open for pre-emption and homestead entry at $2.50 per acre.

The company has since filed a map of "definite location" of their line of route, and I herewith enclose a diagram showing the ten and twenty mile limits as permanently established. You are now directed to withhold from all entry the odd numbered sections found within these limits and not withdrawn by letter above referred to.

The even numbered sections within the ten mile limits and
42 not included in the order of 12th July last are hereby withdrawn from private entry, but are open to pre-emption and homestead entry at the increased price of $2.50 per acre. This withdrawal will not affect the lands within the limits of the Sioux Indian reservation, they being dealt with under special enactment, all tracts withdrawn by letter of 12th July and found to be outside of the 20 mile limits as now established will be restored to the condition they were in at the date of said withdrawal, and the even numbered sections increased to $2.50 by said letter, but falling outside

of the ten mile limits as now established will be reduced in price to $1.25 per acre.

To effect these objects you will prepare a list.

1st. Of the even numbered sections outside of 10 mile limits to be restored to private entry at $1.25 per acre.

2nd. Even numbered sections outside of said limits to be restored to pre-emption and homestead only at $1.25.

3rd. Tracts to be restored to private entry as being outside of the limits of the road, and

4th. Tracts to be restored to pre-emption and homestead entry, as being outside of said limits.

These lists you will publish twice a week for four weeks in a newspaper having the largest circulation in your district, giving notice that on a certain date, of not less than 30 days from date of notice, the tracts will be restored to entry in the manner designated in each list.

The Receiver, as disbursing agent, is authorized to pay for
13 such advertisement, and will charge the same in his disbursing account, transmitting as vouchers a copy of the advertisement with the publisher's certificate of publication attached, and his receipt for payment. It is also desired that a copy of the newspaper containing the advertisement shall be sent to this office without delay.

The withdrawal herein ordered will take effect from the date of the receipt of this, and you will please acknowledge the same without delay.

Very respectfully, JOS. S. WILSON,
Commissioner.

EXHIBIT "J-1."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *April* 23, 1886.

I, Wm. A. J. Sparks, Commissioner of the General Land Office, do hereby certify that the annexed, being four copies of certificates of the Governor of Minnesota, issued February 18, 1871, June 2, 1873, January 10, 1879, and January 10, 1880, of the completion of the Hastings and Dakota Railway from its initial to its terminal point, are true and literal exemplifications of the original, as shown on the map of Construction, now on file in this office.

In Testimony Whereof, I have hereunto subscribed my
14 name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

WM. A. J. SPARKS,
Commissioner of General Land Office.

EXHIBIT "J-2."

EXECUTIVE OFFICE, STATE OF MINNESOTA.
February 18th, 1871.

I, Horace Austin, Governor of the State of Minnesota, do hereby certify that this plat or map of the Hastings and Dakota Railway has been duly filed in my office by the said Hastings and Dakota Railway Company, and shows that portion of the said railroad commencing at the city of Hastings and ending west of the village of Farmington, a distance of twenty miles, which has been completed and equipped as required by the Act of Congress approved July 4th, 1866, and the Acts of the Legislative Assembly of the State of Minnesota approved, respectively, March 7th, 1867, March 9th, 1867, and March 4th, 1869, relating thereto.

In Testimony Whereof, I have hereunto set my hand, and caused to be affixed the Great Seal of the State of Minnesota, done at St. Paul, Minnesota, this 18th day of February, 1871.

HORACE AUSTIN,
Governor of Minnesota.

By the Governor.

H. MATTSON,
Sec. of State.

45 EXHIBIT "J-3."

EXECUTIVE OFFICE, STATE OF MINNESOTA.

I, Horace Austin, Governor of the State of Minnesota, do hereby certify that this plat or map of the Hastings and Dakota Railway has been duly filed in my office by the said Hastings and Dakota Railway Company, and shows that portion of the said railway commencing at Station 1056, in Section 35, Town 114, Range 29, and ending at a point in the village of Glencoe, distance of 51 miles, which has been completed and equipped as required by the Act of Congress approved July 4th, 1866, and the Acts of the Legislative Assembly of the State of Minnesota approved, respectively, March 7th, 1867, March 9th, 1867, and March 2d, 1871, and February 24th, 1872, relating thereto.

In testimony whereof, I have hereunto set my hand, and caused to be affixed the Great Seal of the State of Minnesota.

Done at St. Paul, Minnesota this 2nd day of June, 1871.

HORACE AUSTIN,
Governor of Minnesota.

By the Governor.

S. P. JENNISON,
Sec. of State.

46 EXHIBIT "J–4."

STATE OF MINNESOTA, EXECUTIVE OFFICE.
ST. PAUL, *January 10th*, 1879.

I, J. S. Pillsbury, Governor of the State of Minnesota, do hereby certify that this plat or map of the Hastings and Dakota Railway has been duly filed in my office by the said Hastings & Dakota Railway Company, and shows that portion of the said railway, commencing at Glencoe, McLeod County, and ending at Montevideo, Chippewa County, in said State, which has been completed and equipped as required by the Act of Congress approved July 4th, 1865, and the Act of the Legislative Assembly of the State of Minnesota, approved March 7th, 1867, entitled "An Act to accept" the grant and in execution of the trust made and created in and by an Act of Congress entitled "An Act making an additional grant of land to the State of Minnesota in alternate sections to aid in construction of railroads in said State, granting lands to said Railroad Company, and by the further act of the Legislative Assembly entitled "An Act to extend the time for the completion of the unfinished line of railroad of the Hastings and Dakota Railroad Company, approved February 8th, 1878.

In testimony whereof, I have hereunto set my hand and caused to be affixed the Great Seal of the State. Done at St. Paul this 10th day of January, A. D. 1879.

[SEAL.] J. S. PILLSBURY,
Governor.

Attest
J. S. IRGENE,
Secretary of State.

47 EXHIBIT "J–5."

STATE OF MINNESOTA,
EXECUTIVE OFFICE, ST. PAUL.

I, J. S. Pillsbury, Governor of the State of Minnesota, do hereby certify that this plat or map of the Hastings and Dakota Railway has been duly filed in my office by the said Hastings and Dakota Railway Company, and shows that portion of the said railway, commencing at Montevideo, Chippewa County, and ending at Ortonville, Big Stone County, in said State, which has been completed and equipped as required by the Act of Congress approved July 4th, 1865, and the Act of the Legislative Assembly of the State of Minnesota, approved March 7th, 1867, entitled "An Act to accept" the grant and in execution of the trust made and created in and by an Act of Congress entitled "An Act making an additional grant of land to the State of Minnesota in alternate sections to aid in the construction of railroads in said State, granting lands to said Railroad Company, and by the further act of the Legislative Assembly entitled "An Act to extend the time for the completion of the

unfinished line of railroad of the Hastings and Dakota Railway Company," approved February 8th, 1878.

In testimony whereof, I have hereunto set my hand and
48 caused to be affixed the Great Seal of the State. Done at St. Paul this 10th day of January, A. D. 1880.

[SEAL.] JOHN S. PILLSBURY,
Governor.

Attest:
FREDERICK VON BAUMBACH,
Secretary of State.

EXHIBIT "K."

At a meeting of the board of directors of the Hastings and Dakota Railway Company, held on the 11th of March, 1878

"The vice president read a copy of the act of the legislature of Minnesota, entitled, 'An act to extend the time for the completion of the unfinished line of railroad of the Hastings and Dakota Railway Company,' approved Feb. 8, 1878.

After consideration of the same, on motion of Mr. Sage, it was

"Resolved, That we hereby accept the act of the legislature of the State of Minnesota, approved Feb. 8, 1878, extending the time for the completion of our railway; and that the secretary prepare a copy of this resolution, duly certified by him, to be filed in the office of the Secretary of State, as provided for in Section 6 of said act.

I certify the above to be a true and correct copy from the minutes. Witness my hand and the corporate seal.

[CORPORATE SEAL.] JAMES M. McKINLAY,
Secretary H. & D. Ry. Co.

Filed for record in this office April 1st, 1878, at 9 A. M.

J. S. IRGENS,
Secretary of State.

49 UNITED STATES OF AMERICA,
State of Minnesota:

DEPARTMENT OF STATE.

I, Albert Berg, Secretary of State of the State of Minnesota, do hereby certify that I have compared the annexed copy with the original instrument in my office of the resolution of Board of Directors of Hastings & Dakota Railway Company, filed April 1, 1878, and that said copy is a true and correct transcript of said instrument, and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State at the Capitol in St. Paul this twelfth day of June, A. D. eighteen hundred and ninety-six.

[SEAL.] ALBERT BERG,
Sec. of State.

EXHIBIT "L"

Trust Deed No. 1.

This Indenture, made this Ninth day of December, A. D. one thousand eight hundred and eighty-nine, between the Hastings and Dakota Railway Company, a corporation incorporated and existing under the laws of the State of Minnesota, party of the first part, and Russell Sage, of the City, County and State of New York, party of the second part, witnesseth

50 Recitals omitted.

Now, therefore, this indenture witnesseth, that in consideration of the premises and of one dollar to it in hand paid by the party of the second part, the receipt of which is hereby acknowledged, and in order to divide its capital stock among its several stockholders and to secure the fair and proportionate distribution of the proceeds of its lands and other property among its shareholders in the proportion aforesaid, the party of the first part has granted, bargained and sold and by these presents does grant, bargain and sell, convey and transfer unto the party of the second part, his heirs and assigns and successors in trust, and powers in trust hereinafter declared, all and singular the following described lands in Redwood, Sibley, Yellow Medicine, Big Stone, Lac qui Parle, Chippewa, Renville, Swift and McLeod Counties in the State of Minnesota (descriptions omitted), subject to the deeds heretofore made to the Chicago, Milwaukee & St. Paul Railway Company, and the Wisconsin, Minnesota and Pacific Railway Co., for the right of way, depot grounds and sidetracks, meaning and intending to convey, transfer, set over and assign the entire land grant of said party of the first part hereinbefore referred to not heretofore disposed of, whether already certified to the State of Minnesota and decided by it to the party of the first part or not, and all right to claim certificate and conveyances of any of said lands from the state of the United States, and to prosecute any such claims before the Land Department of

51 the United States, or any of its land offices; all of which uncertified land and the right to prosecute therefor for the consideration aforesaid, the party of the first part hereby sells, grants, transfers assigns and sets over unto the party of the second part, together with all actions or rights of action now pending in any court of any state or of the United States or in or before the Land Department of the United States or any of its land offices, or which hereafter may be pending for the recovery of any of the lands embraced in said grant, or the value thereof, or damages for the detention of the same, and any and all rights of action either in law or equity in regard to the same, to have and to hold subject to all outstanding contracts of said party of the first part in regard to the same to him, his heirs, executors, administrators, assigns and successors in trust as aforesaid.

Hereby granting and conferring on said party of the second part full power to prosecute or defend all actions or causes of action or

proceedings in regard to any of said lands in his name as trustee for the benefit of said trust as fully as the party of the first part can or may do, and to sell and convey all lands which he may recover in any such proceedings, and distribute the proceeds of said sales, and all sums realized in said proceedings as hereinafter provided.

To have and to hold to the party of the second part, his heirs and assigns and successors in said trust, forever, in trust nevertheless,
52 and with full power to sell and convey all and singular the lands herein granted and conveyed, and distribute the proceeds thereof, after deducting the necessary expenses of said sales and the management of said trust, including a reasonable compensation to said trustee, and all taxes and assessments paid by him, to the several persons herein named, preferred stockholders in said party of the first part, in the proportion that the number of shares of such stock held or owned by said stockholders respectively in said party of the first part bears to the entire aggregate of shares in the preferred stock of said corporation issued and outstanding, to-wit:

(Names of stockholders omitted.)

And the said party of the first part does hereby covenant with the said party of the second part, his heirs, assigns and successors in said trust, as follows:

First, that it is lawfully seized of said premises. Second, that it has good right to convey the same for the uses and purposes and in the manner herein expressed; Third, that the same are free from all incumbrances; Fourth, that the said party of the second part, his heirs, assigns and successors in said trust shall quietly enjoy and possess the same, and Fifth, that the said party of the first part will warrant and defend the title of the same against all lawful claims.

In witness whereof the party of the first part has caused this in-
53 denture to be executed by its Vice President, and its corporate seal to be thereto attached, and the party of the second part has set his hand and seal the day and year above written.

THE HASTINGS & DAKOTA RAILWAY CO.,
By W. S. GURNEE, *Its Vice President, and*
JAMES M. McKINLAY, *Its Secretary.*
RUSSELL SAGE. [SEAL.]

EXHIBIT "M."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *October* 17, 1895.

I, S. W. Lamoreaux, Commissioner of the General Land Office do hereby certify that the annexed List of Lands, selected in the Marshall District, Minnesota, for the benefit of the Hastings and Dakota Railway Company is a true and literal exemplification from the original List on file in this office.

In Testimony Whereof, I have hereunto subscribed my name and

caused the seal of this office to be affixed, at the City of Washington on the day and year above written.

[SEAL.] S. W. LAMOREAUX,
Commissioner of General Land Office.

54 UNITED STATES LAND OFFICE AT MARSHALL,
LYON COUNTY, MINNESOTA, *October 26th*, 1891.

The grant of lands made by Congress to the State of Minnesota, to aid in the construction of a railroad from Hastings through the counties of Dakota, Scott, Carver and McLeod, to a point on the western boundary of the state, by act approved July 4th, 1866, entitled "an act making an additional grant of lands to the State of Minnesota in alternate sections to aid in the construction of railroads in said state"; having been turned over and vested in the Hastings, Minnesota and Red River of the North Railroad Co., by act of the Legislature of Minnesota approved March 7, 1867, entitled "an act making an additional grant of lands to the State of Minnesota in alternate sections to aid in the construction of railroads in said state"; "approved July 4, 1866" (the name of which company was afterwards changed to the Hastings & Dakota Railroad Co.); and the entire line of said road having been completed within the time and in the manner prescribed by law by said company; and there being a large deficiency in the said grant of place lands, in lieu of which lands are to be selected in the indemnity limits as prescribed in said act of Congress; and the said Hastings & Dakota Railroad Company having assigned and vested in Russell Sage, in trust, all its rights in the premises;

Now, Therefore, The said Russell Sage by his agent George
55 E. Skinner, and the State of Minnesota, by the said George E. Skinner, also its agent, hereby selects within the indemnity limits of said line of road in lieu of place lands lost to said company, as provided in said act of Congress as follows, to-wit:

All of Section seven (7), Township one hundred and nineteen (119) of Range forty (40), Five hundred ninety-nine and 60-100 acres. All of except N. W. ¼ of N. W. ¼ of Section twenty-three (23), Township one hundred and fourteen (114) of Range twenty-nine (29) six hundred acres.

STATE OF MINNESOTA,
County of Ramsey, ss:

I, Geo. E. Skinner, being duly sworn deposes and says: That I am the agent of Russell Sage, who is the assignee in trust and successor of the Hastings & Dakota Railway Co. and am also the agent of the State of Minnesota in the premises hereof; that the foregoing list of lands, which I hereby select, is a correct list of a portion of the public lands claimed by the said Russell Sage as the assignee and successor in interest of said railroad from Hastings through the counties of Dakota, Scott, Carver and McLeod, to the western boundary of the State, for which a grant of land was made by act of Congress approved July 4th, 1866.

That the said lands are vacant, unappropriated and are not interdict, mineral or reserved lands and are of the character contemplated by said grant, being within the limits of twenty (20)
56 miles on each side of the line of route of said road and outside of the ten (10) mile limits of said grant.

That the specific losses for which the indemnity is claimed are truly set forth and described in this list and that said losses have not heretofore been indemnified in any manner whatever.

GEO. E. SKINNER, *Agent.*

Subscribed and sworn to before me this 26th day of October, A. D. 1891.

H. W. EDDY,
[SEAL.] *Notary Public, Ramsey Co., Minnesota.*

UNITED STATES LAND OFFICE,
MARSHALL, MINNESOTA, *Oct.* 29, 1891.

We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by Russell Sage, assignee in trust and successor in interest of the Hastings & Dakota Railway Co. and also the State of Minnesota under the grant to the State of Minnesota by act of Congress approved July 5th, 1866, and selected by George E. Skinner, the duly authorized agent and we have tested the accuracy of said list by the plats and records of this office and that we find the same to be correct, and we further certify that the filing of said list is allowed and approved and that the whole of said lands are surveyed public land of the United States and within the limits of
57 twenty (20) miles on each side of the line of the route of said road and that the same are not, nor is any part thereof returned and denominated as mineral land or lands, nor claimed as swamp lands, nor is there any homestead, preemption, state or other valid claim, if any, of the St. Paul, Minneapolis and Manitoba Railway Company.

We further certify that the foregoing list shows an assessment of the fees, payable to us allowed by the act of Congress approved July 1st, 1864, and contemplated by the circular of instructions dated Nov. 7, 1879, addressed by the Commissioner of the General Land Office to Registers and Receivers of the United States Land Offices, and that the said party had paid to the undersigned, the Receiver, the full sum of eight hundred and twenty-eight dollars ($828.00) in full payment and discharge of said fees.

L. M. LANGE, *Register.*
E. P. FREEMAN, *Receiver.*

EXHIBIT "N."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *August* 24, 1900.

I, W. A. Richards, Acting Commissioner of the General Land Office, do hereby certify that the annexed copy of List No. 12 of

lands approved to the State of Minnesota under the act of July 4th, 1866, for the benefit of the Hastings & Dakota Railroad Company, in the indemnity limits, Marshall District, Minnesota, is a
58 true and literal exemplification of the original list on file in this office.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the City of Washington on the day and year above written.

[U. S. Land Office Seal.]

W. A. RICHARDS,
Commissioner of General Land Office.

U. S. Int. Rev., 10c. W. A. Richards, 8-24-1900.

Hastings and Dakota Railroad, List No. 12.

List of lands outside of the ten and within the twenty mile limits of the reserve to satisfy the grant made to the State of Minnesota by the Act of Congress approved July 4, 1866 (14 Stat., 87), entitled "An Act making an additional grant of lands to the State of Minnesota, in alternate sections to aid in the construction of railroads in said State," being the lands selected by the agent of the State of Minnesota, from the lands of the United States in alternate sections and parts of sections, designated by odd numbers most contiguous to the tier of sections within five alternate sections in width on each side of the Hastings and Dakota Railroad, and in lieu of the lands in the alternate sections designated by odd numbers within said five alternate sections in width which
59 the United States has sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or preemption had attached prior to the time the line of said road was definitely fixed.

North of Base Line and West of 5th Principal Meridian, Minn.

Hastings and Dakota Railroad List.

Parts of Sec.	Sec.	Tp.	Rng.	Acres.

Marshall Land District.

List No. 1 approved by R. & R. Oct. 29-94.

N. W.
S. E. ¼ 7 119 40 160

N. W.
N. E. ¼ 23 114 30 160.

GENERAL LAND OFFICE,
RAILROAD DIVISION, *June* 11, 1900.

We hereby certify that the foregoing clear list has been examined in connection with the records and plats of this office, the tracts found vacant and unappropriated within the limits set apart for in-

demnity under the grant by the Act of July 4, 1866, to the State of Minnesota for the use and benefit of the Hastings and Dakota Railroad Company, and subject to approval thereunder, and that the tracts specified as bases for these selections are within the primary limits of the grant and are shown by the records to have been excepted therefrom, and have not been used as bases for previous selections.

W. K. MENDENHALL,
W. J. DRUMMOND,
Examiners.

Approved:
S. S. MARR,
Chief of Division.

60 GENERAL LAND OFFICE,
DIVISION OF SWAMP LANDS.

This certifies that the foregoing list No. 12, of lands selected by the Hastings and Dakota Railroad Company embracing 4,691.05 acres, has been carefully examined in connection with the swamp land records of this office and that the same has been found free from conflict.

E. H. HUNTER,
Examiner.

Approved:
SAMUEL W. SNOW,
Acting Chief of Division.

MINERAL DIVISION, *June* 14, 1900.

This certifies that under Sec. 2345 U. S. Rev. Stats. the U. S. mining laws do not apply to public lands in the State of Minnesota.

C. A. HOLLINGSWORTH,
Examiner.

Approved:
H. G. POTTER,
Chief of Division.

61 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *June* 15, 1900.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the foregoing list covering four thousand six hundred and ninety-one acres and five hundredths of an acre is a true and correct list of the tracts of land selected by the agent of the State of Minnesota, outside of the ten and within the twenty mile limits, under the act of Congress approved July 4th, 1866, entitled "An Act making an additional grant of lands to the State of Minnesota, in alternate sections to aid in the construction of railroads in said State," being a portion not heretofore approved of the lands of the United States in the alternate sections designated by odd numbers most contiguous to the tier of sections within five alternate sections in width on each side of the Hastings and Dakota Railroad and

in lieu of the lands in the alternate sections designated by odd numbers within said five sections in width on each side of said road which the United States has sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption had attached prior to the period at which the rights of the State inured under said grant and they are now submitted for the approval of the Secretary of the Interior in accordance with the requirements of said Act of July 4, 1866, for the benefit of Russell Sage, trustee of the assets of the Hastings & Dakota Railway Company
62 subject to all its conditions and to any valid interfering rights which may exist to any of the tracts embraced in the foregoing list.

In Testimony Whereof, I have hereunto subscribed my name and caused the seal of the General Land Office to be affixed, at the City of Washington on the day and year first herein above written.

[SEAL.] BINGER HERMANN,
Commissioner.

S. S. M.

J. I. P.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *June* 18, 1900.

Approved: subject to the conditions and rights above mentioned, embracing four thousand six hundred and ninety-one acres and five hundredths of an acre.

E. A. HITCHCOCK, *Secretary.*
D. L.

EXHIBIT "O."

State of Minnesota, District Court, County of Ramsey.

In the Matter of the Petition for Appointment of a Trustee in Place of RUSSELL SAGE, Deceased, as to Hastings and Dakota Railway Company.

63 The above entitled matter came duly before me to be heard and it appearing, upon petition and proof duly made, that on the 9th day of December, 1889, the Hastings and Dakota Railway Company, a corporation created and existing under the laws of the State of Minnesota, for a valuable consideration, duly made, executed and delivered to Russell Sage, of the City, County and State of New York, a trust deed, of which the following is substantially a copy.

Trust Deed No. 1.

This Indenture, made this ninth day of December, A. D. one thousand eight hundred and eighty-nine, between the Hastings and Dakota Railway Company, a corporation incorporated and existing under the laws of the State of Minnesota, party of the first part, and

Russell Sage of the City, County and State of New York, party of the second part, witnesseth.

(Recitals omitted.)

And Whereas, by resolution of meetings of its stockholders and of its board of directors both duly convened and held, the Vice President and Secretary of said Hastings & Dakota Railway Company are authorized to sell and convey in the name of The Hastings & Dakota Railway Company, all the lands embraced in the land grant made by the Congress of the United States to the State of Minnesota in aid of the railroad of said Company, and to assign, convey,
64 transfer and set over all the property, estate and assets, real personal and mixed of the said railroad company, including all choses in action held or owned by said company, and all actions or rights of action, whether now pending or hereafter to be brought together with the right to prosecute in his own name as such trustee all actions or rights of action now pending in any court of any state of the United States, or any proceeding in or before the land department of the United States or any of its land offices, or which hereafter may be pending for the recovery of any of the lands embraced in said grant, or the value thereof, or damages for the detention of the same, and any and all rights of action in law or in equity in regard to the same, to have and to hold the same subject to all outstanding contracts of the party of the first part, and to sell and convey all lands which he may recover in any such proceedings, and distribute the proceeds of said sales, and all sums realized in such proceedings as hereinafter stated, unto Russell Sage of the city of New York, in trust and with the power to sell and convey said lands, and to sell, assign or convert into money all the other assets of said company, and to prosecute, sue for and collect all actions or choses in action, and to distribute the proceeds thereof after deducting the necessary costs and expenses of said sales, and the management of said trust including a reasonable compensation to said trustee, and all taxes and assessments paid by him to the preferred stockholders of said company in the proportions respectively that the amount of such stock owned by them bears to
65 the entire amount of preferred capital stock of said corporation issued and outstanding.

Now therefore, this indenture witnesseth that in consideration of the premises and of one dollar to it in hand paid by the party of the second part, the receipt of which is hereby acknowledged, and in order to divide its capital stock among its several stockholders and to secure the fair and proportionate distribution of the proceeds of its lands and other property among its shareholders in the proportion aforesaid, the party of the first part has granted, bargained and sold and by these presents does grant, bargain and sell, convey and transfer unto the party of the second part, his heirs and assigns and successors in trust, and powers in trust hereinafter declared, all and singular the following described lands; subject to the deeds heretofore made to the Chicago, Milwaukee & St. Paul Railway Co., the St. Paul, Minneapolis & Manitoba Railway Co., and the Wisconsin, Minnesota and Pacific Railway Co., for the right of way, depot grounds and sidetracks. (Here follows description of lands), mean-

ing and intending to convey, transfer, set over and assign the entire land grant of said party of the first part hereinbefore referred to not heretofore disposed of, whether already certified to the State of Minnesota and deeded by it to the party of the first part or not, and all rights to claim certificates and conveyances of any of said lands from the State or United States, and to prosecute any such claims
66 before the Land Department of the United States, or any of its land offices; all of which uncertified lands and the right to prosecute therefor for the consideration aforesaid, the party of the first party hereby sells, grants, transfers, assigns and sets over unto the party of the second part, together with all actions or rights of action now pending in any court of any state or of the United States, or in or before the Land Department of the United States or any of its land offices, or which hereafter may be pending for the recovery of any of the lands embraced in said grant, or the value thereof, or damages for the detention of the same, and any and all rights of action either in law or equity in regard to the same, to have and to hold subject to all outstanding contracts of said party of the first part in regard to the same to him, his heirs, executors, administrators, assigns and successors in trust as aforesaid.

Hereby granting and conferring on said party of the second part full power to prosecute or defend all actions or causes of action or proceedings in regard to any of said lands in his name as trustee for the benefit of said trust as fully as the party of the first part can or may do, and to sell and convey all lands which he may recover in any such proceedings, and distribute the proceeds of said sales, and all sums realized in said proceedings as hereinafter provided.

To have and to hold to the party of the second part, his heirs and assigns and successors in said trust forever, in trust nevertheless, and with full power to sell and convey all and singular the lands
67 herein granted and conveyed, and distribute the proceeds thereof, after deducting the necessary expenses of said sales and the management of said trust, including a reasonable compensation to said trustee, and all taxes and assessments paid by him, to the several persons herein named, preferred stockholders in said party of the first part, in the proportion that the number of shares of such stock held or owned by said stockholders respectively in said party of the first part bears to the entire aggregate of shares in the preferred stock of said corporation issued and outstanding, to-wit:

(Names omitted.)

In witness whereof the party of the first part has caused this indenture to be executed by its Vice President and Secretary, and its corporate seal to be thereto attached, and the party of the second part has set his hand and seal the day and year first above written.

THE HASTINGS & DAKOTA RAILWAY CO.,

[CORPORATE SEAL.]

By W. S. GURNEE,
Its Vice President, and
JAMES M. McKINLEY,
Its Secretary.

RUSSELL SAGE. [SEAL.]

68 Witnesses for Hastings & Dakota Railway Co.

WM. S. THORN, JR.
A. SCHAFFERT.

Witnesses for Russell Sage:
WM. S. THORN, JR.
J. H. EVANS.

(Acknowledgement omitted.)

And it also appearing that said Russell Sage on the 22nd day of July, 1906, died, without having fully administered the trust in and by said trust deed created.

And this Court, under the provisions of the statutes, and having been duly petitioned therefor, does hereby appoint as successors to said Russell Sage in all the matters mentioned in said deed, Joseph J. Slocum and Edward C. Osborn of the City, County and State of New York, to fully carry out the provisions of said trust, and it is ordered that such trustees be and they are hereby vested with all the rights, powers and duties, title, interest and estate by said deed of trust imposed upon, transferred or paid over to, said Russell Sage, as such trustee in said deed of trust, and the title to each and of all the following described lands is hereby conveyed and transferred to and vested in said trustees, their heirs, assigns and successors, subject to the provisions of said trust deed and subject to any contracts relating thereto, made by said Russell Sage, as trustee, and subject to the deeds heretofore made by the Hastings and Dakota Railway

69 Company to the Chicago, Milwaukee & St. Paul Railway Company, the St. Paul, Minneapolis and Manitoba Railway Company, and the Wisconsin, Minnesota and Pacific Railroad Company, for right of way, depot grounds and side tracks, to-wit:

Southeast quarter of Section 7, in Township 119, Range 40, in Swift County, Minnesota, and other property.

And also there is hereby conveyed, transferred to and vested in said trustees, their heirs, assigns and successors the entire land grant of the Hastings & Dakota Railway Company referred to in said trust deed, not heretofore disposed of, whether already certified to the State of Minnesota or not, and all right to claim certificates and conveyances of any of said lands from the State of Minnesota or the United States of America; and to prosecute any such claims before the land department of the United States or any of its land offices, all of which uncertified lands and the right to prosecute therefor are hereby granted, conveyed, assigned, set over and vested in the said trustees; together with all actions or rights of action now pending in any court of any state or of the United States or in or before the land department of the United States or any of its land offices, or which hereafter may be pending for the recovery of any of the lands embraced in said grant, or the value thereof, or damages for the detention of the same, and any and all rights of action, either in law or equity in regard to the same, to have and to hold subject to all

outstanding contracts of said Russell Sage, as trustee aforesaid, to them, their heirs, executors, administrators, assigns and successors in trust as aforesaid.

70 Hereby granting and conferring on and vesting in said trustees full power to prosecute or defend all actions or causes of action or proceedings in regard to any of said lands in their own names as trustees for the benefit of said trust, and to sell and convey all lands which they may recover in any such proceeding and distribute the proceeds of said sales and all sums realized in said proceedings as hereinafter provided.

To have and to hold to the said Joseph J. Slocum and Edward C. Osborn, said trustees, their heirs, assigns and successors in said trust forever, in trust nevertheless, and with full power to sell and convey all and singular the lands herein granted and conveyed and distribute the proceeds thereof after deducting the necessary expenses of said sales and the management of said trust including a reasonable compensation to said trustees, and all taxes and assessments on said lands paid by them to the several persons named in the aforementioned trust deed and designated as preferred stockholders of the Hastings & Dakota Railway Company, or their representative or assigns, in the proportion that the number of shares of such stock held or owned by such stockholders respectively in said Company bears to the entire aggregate of shares in the preferred stock of said corporation issued and outstanding, to-wit:

(Names omitted.)

Each and all of the foregoing are hereby ordered, adjudged and decreed on this the 19th day of December, 1906, at the City

71 of St. Paul, in the County of Ramsey and State of Minnesota.

GRIER M. ORR,
Judge of the District Court of Ramsey County, Minnesota, Second Judicial District.

Endorsed: Filed, Dec. 19, 1906, Edward G. Rogers, Clerk. By G. A. Johnson, Deputy.

Exhibit 1."

United States of America,
State of Minnesota, District Court,
County of Chippewa, ss:

Peter Nilson Froyseth personally appeared before the subscriber, the Clerk of the District Court of the 12th Judicial District for said State of Minnesota, being a Court of Record, and made oath that he was born in Norway on and about the year eighteen hundred and forty-nine; that he emigrated to the United States and landed at the port of Boston on or about the month of March in the year eighteen hundred and eighty-five; that it is *bona fide* his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign Prince, Potentate, State or Sovereignty

whatever, and particularly to the King of Sweden and Norway whereof he is a subject.

PETER NILSON FROYSETH.

Subscribed and sworn to this 1st day of Nov. A. D. 1888.
[SEAL.] ELIAS JACOBSON, *Clerk.*

72 UNITED STATES OF AMERICA.
State of Minnesota, County of Chippewa, ss:

I, Elias Jacobson, Clerk of the District Court of the 12th Judicial District for the State of Minnesota, do hereby certify that the foregoing is a copy of a record now in my office.

In testimony whereof, I have hereto set my hand and affixed the seal of the said District Court, this 1st day of November, 1888.
[SEAL.] W. A. *RICHARDS, Clerk.*

"EXHIBIT 2."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *April 17th*, 1906.

I hereby certify that the annexed Homestead Application and Affidavit of Peter Froyseth for the S. E. ¼ Section 7, Township 119, North of Range 40 west, of 5 principal meridian, Minnesota are true and literal exemplifications of the originals now on file in this office.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.
[SEAL.] W. A. RICHARDS,
Commissioner of the Gen. Land Office.

73 Homestead.

LAND OFFICE AT MARSHALL, MINN., *Nov. 3rd*, 1891.

I, Peter Froyseth, of Montevideo, Minnesota, do hereby apply to enter, under Section 2289, Revised Statutes of the United States, the Southeast Quarter of Section 7, in Township 119 of Range 40, containing 160 acres.

PETER FROYSETH.

Homestead Affidavit.

LAND OFFICE AT MARSHALL, MINN., *Nov.* 3, 1891.

I, Peter Froyseth, of Montevideo, Minn., having filed my application for an entry under section 2289 Revised Statutes of the United States, do solemnly swear that I am not the proprietor of more than one hundred and sixty acres of land in any State or Territory; that I am over the age of twenty-one years and have filed my declaration

to become a citizen of the United States, that my said application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons or corporation, and that I will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence and cultivation necessary to acquire title to the land applied
71 for; that I am not acting as agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that I do not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for myself, and that I have not directly or indirectly made, and will not make, any agreement or contract in any way or manner with any person or persons, corporation, or syndicate whatsoever, by which the title which I might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except myself, and further, that since August 30th, 1890, I have not entered under the land laws of the United States or filed upon a quantity of land; agricultural in character, and not mineral, which, with the tracts now applied for, would make more than three hundred and twenty acres, that *he* resides on the said described land and has not heretofore made an entry under the homestead laws of *us*.

PETER FROYSETH

Sworn and subscribed to before me this 3rd day of Nov. 1891, at ——.

L. M. LANG, *Register*

Here insert statement that affiant is a citizen of the United States, or that he has filed his declaration to become such, and that
75 he is the head of a family, or is over twenty-one years of age, as the case may be. It should be stated whether applicant is native born or not, and if not, a certified copy of his certificate of naturalization, or declaration of intention, as the case may be, must be furnished (see page 45, circular of January 1, 1890).

Here add an exception, if any, of land settled upon prior to August 30, 1890, giving date of settlement, commencement and describing improvements and that the party has not heretofore made any entry under the homestead laws.

"EXHIBIT 3"

UNITED STATES LAND OFFICE,
MARSHALL, MINN., *Oct.* 25, 1894

Peter Froyseth, Montevideo, Minnesota

SIR: By Hon. Commissioner's letter 7 of Sept. 11, 1894, the decision of the local land office, rejecting the application, dated Nov. 1891, of yourself to make Homestead entry for the S. E. ¼ of Sec

7, Twp. 119, N. of Range 40 W. of the 5th P. M., from which an appeal was taken, is affirmed.

60 days are hereby allowed in which to appeal.

C. P. SHEPARD, *Register.*
—— ——, *Receiver.*

76 EXHIBIT "4."

UNITED STATES LAND OFFICE.
MARSHALL, MINN., *Feb.* 13, 1896.

PETER FROYSETH
vs.
HASTINGS & DAKOTA RY. CO.

Involving S. E. ¼, Sec. 7, Twp. 119 of Range 40.

Peter Froyseth, Montevideo, Minn.

SIR: In reference to the above entitled case, you are hereby advised that on January 25, 1896, the Department affirmed the decision of the General Land Office, dated September 11, 1894.

Take Notice, that unless a motion for review of said departmental decision is filed within thirty days from notice hereof, the said decision will become final, and the cause will be closed by the commissioner.

In the event that you employ resident counsel in Washington to file, in the General Land Office, a motion for review, you should, in order to protect your interests, promptly notify this office to that effect.

Very respectfully,

C. P. SHEPARD, *Register.*

77 "EXHIBIT E."

F.
C. A. O.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Dec.* 22, 1902.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed copy of the letter of the Acting Secretary of the Interior to the Commissioner of the General Land Office, dated May 22, 1891, relative to the revocation of withdrawals made on account of certain roads, is a true and literal exemplification of the original now on file in this office.

In Testimony Whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

[Land Office Seal.]

BINGER HERMANN,
Commissioner of the Gen. Land Office.

1915-1891. G. H. S. F. L. C. E. M. WH. E. M. WH
V. B. J. B. McN. L. R. S.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *May* 22, 1891.

Restoration of Indemnity Lands.

The Commissioner of the General Land Office,

SIR: On December 30, 1890, a rule was entered on certain land grant railroad companies to show cause within thirty days
78 from receipt thereof why the several orders of withdrawal from settlement of the lands within the indemnity limits of their respective grants should not be revoked and the lands therein embraced restored to settlement.

A copy of the rule was duly served on each of the following companies:

St. Paul and Sioux City R. R. Co.
St. Paul, Stillwater and Taylor's Falls, R. R. Co.
St. Paul & Northern Pacific Ry. Co.
Sioux City & St. Paul R. R. Co.
Great Northern Railway Co. (formerly St. Paul, Minneapolis & Manitoba Ry. Co.)
Winona & St. Peter R. R. Co.
Hastings & Dakota R. R. Co., and the
Chicago, Milwaukee and St. Paul R. R. Co.

A rule was also entered on the Iowa Railroad Land Company, successor to the land grant for the Cedar Rapids and Missouri River Railroad Company, to show cause why the order withdrawing from settlement the lands within the indemnity limits of the grant to the State of Iowa for the benefit of the Cedar Rapids and Missouri River Railroad Company should not be revoked and the lands therein embraced restored to settlement.

Of these companies, the St. Paul and Sioux City Railroad Company, the Iowa Railroad Land Company and the St. Paul and Northern Pacific Railway Company have responded to the rule by filing written reasons why the order revoking the withdrawals should not be made.

79 The other companies cited to discharge the rule entered against them have made no response.

There probably is but a small amount of vacant unappropriated lands within the indemnity limits of some of the above named roads, still the withdrawals remain in force and are obstacles in the way of law-abiding citizens who may desire to settle upon the lands within the indemnity limits of said roads. I therefore direct that, after giving the usual notice, all lands under withdrawals heretofore made and held for indemnity purposes under the grants to said roads be restored to the public domain and opened to settlement and entry in accordance with the rules heretofore established in similar cases.

Very respectfully,

GEO. CHANDLER,
Acting Secretary.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.
v.
HASTINGS AND DAKOTA RY. CO.

Secretary Noble to the Commissioner of the General Land Office, October 23, 1891.

This case involves about 67,000 acres of land within the conflicting limits of the grants made by the acts of March 3, 1857 (11 Stat. 195), and March 3, 1865 (13 Stat. 526), for the St. Paul, Minneapolis and Manitoba Railway Company, and July 4, 1866 (14 Stat. 87), for the Hastings and Dakota Railway Company. These
80 lands are within the Marshall land district, Minnesota. They are all within the "indemnity" limits of the grant for the Manitoba Railway Company, the withdrawal for which was made August 14, 1868, but lie partly within both the "granted" and "indemnity" limits of the grant for the Hastings & Dakota Railway Company.

The right of the latter company to lands within the granted limits, is held to have attached June 26, 1867, and the order of withdrawal including the indemnity lands was made April 22, 1868.

For convenience in disposing of this matter, I have divided the lands into two classes:

"A" Those within the "granted" limits of the Hastings and Dakota Railway Company's grant, and also within the indemnity limits of the Manitoba Company's grant.

"B" Those within the "indemnity" limits of the grants for both roads.

On February 19, 1880, the Manitoba Company applied to select all of these lands, which application was forwarded to your office for instructions (1) as to whether the company was required to designate the lands in place in lieu of which the selections were claimed, and (2) as to whether the lists were regular in form.

It does not appear that any action was ever taken upon this list by your office, and, on May 26, 1883, the Hastings and Dakota Railway company made application for the same lands divided into two lists, separating the granted and indemnity lands.

81 These applications were rejected by the local officers, for the reasons:

(1) That there is nothing to show that the Hastings and Dakota Railway Company is entitled to the lands, and

(2) That the lands are within the limits of the grant to the St. Paul, Minneapolis and Manitoba Railway Company, and withdrawn for the benefit of that company.

From such rejection the company appealed.

Class B.

As to this class of land—viz. Those within the indemnity limits common to both grants—your office opinion holds:

"I am of the opinion that either company is entitled to the right of selection, and that priority of right to the land is secured by that

company which first presents its application to select the same without regard to the dates of the grants, define location of the lines, or withdrawal of lands, and the following cases are relied upon in support thereof; Ryan *v.* Railroad, 99 U. S. 386; Kansas Pacific R. R. Co. *v.* Atchison, Topeka and Santa Fe R. R. Co., 112 U. S. 414; St. Paul and Sioux City R. R. Co. *v.* Winona & St. Peter R. R. Co., 112 U. S. 720; Winona and St. Peter Ry Co. *v.* Barney, 113 U. S. 618; Barney *v.* Winona and St. Peter R. R. Co., 117 U. S. 228.

You therefore award these lands to the Manitoba Company under the selection of February 19, 1880, and sustain the rejection of the selection by the Hastings and Dakota Company.

82 In the acts making the grants claimed by both of these companies provision is made for the withdrawal of the lands as soon as maps shall be filed designating the routes of the roads.

The fifth section of the act of July 4, 1866, provides:

That as soon as the governor of said state shall file or cause to be filed with the Secretary of the Interior maps designating the routes of said roads, then it shall be the duty of the Secretary of the Interior to withdraw from the market lands embraced within the provisions of this act.

The withdrawal directed by said section has been held to include both granted and indemnity limits. H. R. Ex. Doc., 246, 1st. Sess. 50th Congress.

It will be remembered that the definite location and withdrawal on account of the grant for the Hastings and Dakota Railway Company, west of Range 38 W., was prior to the withdrawal for the Manitoba Company, hence, under the contention by the Manitoba Company in support of its claim to the lands in class "A" it would be held that at the date of the Manitoba Company's selection in 1880, the lands were not subject thereto having been reserved under the withdrawal for the Hastings and Dakota Company.

With my views as to the validity of the selections heretofore made, and in view of the forfeiture act of September 29, 1890 (26 Stat. 496) the fourth section of which repeals the section referred to in the acts making the grants for these companies, in so far as said

83 sections require the Secretary of the Interior to reserve lands within the indemnity limits of such grants, I deem it unnecessary to pass upon the question as to the effect of such withdrawal, while in existence, upon the respective right of the parties to make indemnity selection of the lands within their common limits.

In the circular of November 7, 1879, to registers and receivers, relative to the adjustment of land grants, under the heading "indemnity selections for railroads," is the following:

In the adjustment of all grants it consequently becomes necessary to know for what lands lost in place the indemnity selections are made, and with the view to that end you will require the companies to designate the specific tracts for which the lands selected are claimed.

These instructions have never been revoked, and were consequently in force at the dates of the several selections made by these companies.

The selection of February 19, 1880, by the Manitoba company, was not accompanied by a designation of losses, and for this reason should have been rejected.

The selection of May 26, 1883, by the Hastings and Dakota Railway Company, was also unaccompanied by a designation of losses, and should have been rejected for this reason.

The orders of withdrawal of indemnity lands for these companies having been revoked (12 L. D. 541), and there being no valid selection of the lands by either company, you will hold the
84 same subject to entry by the first legal applicant, or to selection by the company first presenting application therefor, in the manner prescribed by the regulations governing such selections.

EXHIBIT "P."

DEPARTMENT OF THE INTERIOR.
GENERAL LAND OFFICE.
WASHINGTON, D. C., *Dec.* 22, 1902.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed copy of office letter of May 28th, 1891, to Register and Receiver at Marshall, Minnesota, revoking certain withdrawals of land previously made is a true and literal exemplification from the record thereof on file in this office.

In Testimony Whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

[Commissioner's Seal.]

BINGER HERMANN,
Commissioner of the Gen. Land Office.

85 DEPARTMENT OF THE INTERIOR. F. W. C.
GENERAL LAND OFFICE. W. C. E.
64844½–91. WASHINGTON, *May* 28, 1891.

Register and Receiver, Marshall, Minnesota.

SIRS: Under instructions from the Honorable Secretary of the Interior, dated May 22, 1891, you are directed to restore to the public domain and open to settlement and entry all lands heretofore withdrawn in your district within the indemnity limits of the grants for the Saint Paul and Sioux City; St. Paul, Stillwater and Taylor's Falls; St. Paul and Northern Pacific; St. Paul, Minneapolis and Manitoba; Hastings and Dakota; Winona and St. Paul, and the Chicago, Milwaukee and St. Paul Railroad Companies, and not embraced in selections heretofore made or applied for by said companies; but this restoration shall not affect the rights acquired by grantees within the primary limits of any other congressional grant.

Notice of said restoration will be given by public advertisement for a period of thirty days in some newspaper having general circulation in your district, and in such notice a date should be set (not

less than 30 days from the date of the notice) when the lands — be opened to entry.

A copy of the newspaper containing the notice should be promptly forwarded for the information of this office.

86 The receiver, as disbursing officer, will pay the costs of publication, and should forward a copy of the notice with proof of publication as his voucher for the disbursement.

Any rejected lists by the company, pending on appeal before this office should be noted upon your records, as such lands are not included in the restoration, and in the event that any such lists are not noted upon your records they will be returned to you for that purpose upon application.

In the disposition of applications for lands embraced in pending selections by any or all said companies you will be governed by the rules established for the disposition of applications under the orders of August, 1887, viz.:

Applications to make entries upon lands covered by unapproved selections may be received, noted and held subject to the claim of the company, of which the applicant must be distinctly informed and memorandum thereof entered upon his papers, but such entries must not be permitted to go to record.

Whenever such application is presented alleging upon sufficient *prima facie* showing that the land is not from any cause subject to the company's right of selection, notice thereof will be given to the proper representative of the company, which will be allowed thirty days after service of said notice within which to present objections to the allowance of said entry.

87 Should the company fail to respond or show cause within the time allowed said application to make entry will be admitted, and the selection held for cancellation; but should the company appear and show cause an investigation will be ordered, under the rules of practice, to determine whether said land is subject to the right of the company to make selections of the same, which will be determined by the Register and Receiver, subject to the right of appeal in either party.

When appeals are taken from the decision of the Register and Receiver to this office in the class of cases above provided for, they will be disposed of without delay, and if the decision should be in favor of the company and no appeal be taken the land will be certified to the Secretary of the Interior for approval for patent, without requiring further action on the part of the company, except the payment of the required fees. If the decision should be adverse to the company, and no appeal be taken, the selection will be cancelled and the filing or entry allowed, subject to compliance with law.

Lands which have not been selected will be subject to settlement and entry as other public lands, and notice to the company will not be required.

Very respectfully,

W. M. STONE,
Acting Commissioner.

88 EXHIBIT "Q."

DEPARTMENT OF THE INTERIOR.
GENERAL LAND OFFICE.
WASHINGTON, D. C., *Dec.* 22, 1902.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed copies of the selections made by the Hastings and Dakota Railway Company on May 26, 1883, for both place and indemnity lands in Minnesota, are true and literal exemplifications of the originals on file in this office.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

(Signed) BINGER HERMANN,
[SEAL.] *Commissioner of General Land Office.*

STATE OF MINNESOTA.
UNITED STATES LAND OFFICE, *May 26th*, 1883.

The Hastings and Dakota Railway Company, formerly the Hastings, Minnesota River and Red River of the North Railroad Company, under and by virtue of the Acts of Congress entitled "An Act making additional grants of land to the State of Minnesota in alternate sections to aid in the construction of railroads in said State," approved on the fourth day of July, One Thousand
89 Eight Hundred and Sixty-six. And under and in pursuance of the rules and regulations prescribed by the Commissioner of the General Land Office, hereby makes and files the following list of selections of public lands claimed by the said company as inuring to it, and to which it is entitled under and by virtue of the grants and provisions of the said Acts of Congress and the location of the line of route of the railway of said company, being for the entire line of said road, the same having been fully completed and in operation, commencing at Hastings and ending at the western boundary of the said State of Minnesota.

The selections being particularly described as follows, to-wit: (Here follows list of lands, including all of Section 7, Township 119, Range 40, containing lands described in the complaint.)

STATE OF MINNESOTA,
County of Ramsey, ss:

I, George E. Skinner, being duly sworn, deposes and says that I am the Land Agent of the Hastings and Dakota Railway Company, formerly Hastings, Minnesota River and Red River of the North Railway Company; that the foregoing lists of lands, which I hereby select, is a correct list of a portion of the public lands claimed by the said railway company as inuring to it, to aid in the construction of the road from Hastings to the western boundary of the state, for
which a grant of lands was made by the Acts of Congress ap-
90 proved July 4th, one thousand eight hundred and sixty-six; that the said lands are vacant, unappropriated, and are not

interdicted mineral nor reserved lands, and are of the character contemplated by the grant, being within the limits of 20 miles on each side of the line of route of said road.

GEORGE E. SKINNER.
Land Agent of Hastings & Dakota Ry. Co.

Sworn and subscribed before me this 7th day of April, 1883.

J. H. SKINNER.
[SEAL.] *Notary Public, Ramsey County, Minn.*

Endorsed.

UNITED STATES LAND OFFICE.
BENSON, MINN., *May 26th*, 1882.

This list is refused for the following reasons.

1st. There is nothing to show that the Hastings and Dakota Railway Company are entitled to these lands.

2nd. These lands are within the limits of the grant to Saint Paul, Minneapolis and Manitoba Railroad Company, and withdrawn for the benefit of that road.

D. S. HALL, *Register.*
H. W. STONE, *Receiver.*

91 EXHIBIT "R."

ST. PAUL, MINN., *June* 21, 1883.

D. S. Hall, Esq., H. W. Stone, Esq., Register and Receiver, United States Land Office, Benson, Minn.

GENTLEMEN: I respectfully appeal from your decision within stated, on the ground that the lands mentioned in the list hereto attached are within the limits of the Hastings & Dakota Railway Company's grant.

That the St. Paul, Minneapolis and Manitoba Railroad Company is not entitled to select indemnity lands in lieu of lands sold and disposed of prior to the date of their grant, and that under this rule the grant to that road is already filled.

GEORGE E. SKINNER,
Land Commissioner of Hastings & Dakota Ry. Co.,
By WM. H. KELLY, *Attorney.*

Endorsement on back: Received and filed June 23, 1883. D. S. Hall, Register. Posted June 10, '84. M. P. W. 1883. 69052-2. 5-4218.

92 EXHIBIT "S."

DEPARTMENT OF THE INTERIOR,
F. GENERAL LAND OFFICE,
C. A. O. WASHINGTON, D. C., *Dec.* 22, 1902.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed copy of the letter from the Register and Receiver at Benson, Minnesota, dated July 24th, 1883, to this office transmitting two lists of lands selected by the Hastings and Dakota Ry. Co., under Act of July 4, 1866, is a true and literal exemplification of the original on file in this office.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

[Commissioner's Seal.]

BINGER HERMANN,
Commissioner of the Gen. Land Office.

UNITED STATES LAND OFFICE,
BENSON, MINN., *July 24th*, 1883.

Commissioner General Land Office, Washington, D. C.

SIRS: We transmit herewith two lists of lands selected by the Hastings and Dakota Railway Company, under Act of July 4, 1866. One of said lists being for lands within the ten mile limits
93 of said road, and the other for lands within the twenty mile limits of said road; office fees tendered and refused.

We rejected said lists for the reasons thereon indorsed.

The said Railway Company have appealed from our decision, and the grounds of appeal are also indorsed on the enclosed lists.

Very respectfully,

D. S. HALL, *Register.*
H. W. STONE, *Receiver.*

EXHIBIT "T."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *July* 22, 1890.

The Honorable the Secretary of the Interior.

SIR: I have the honor to submit, herein, an adjustment of the grant made by the Act of July 4, 1866, to the State of Minnesota, to aid in the construction of a railroad from Hastings, Minnesota, to the western boundary of State.

The present owner of the grant, as far as known to this office, is the Hastings and Dakota R. R. Co., but it is understood that the charter of this company has been annulled by decision of the Supreme Court of the State, and that the time allowed to wind up its affairs has expired.

The road, as built, extends from Hastings to Ortonville, on the western boundary of the State, a distance of 202.1 miles, but
94 74 miles of which was built in time, viz.: from Hastings to Glencoe.

The entire road is now operated by the Chicago, Milwaukee and Saint Paul Railway Co.

Statement.

Area included within the grant		1,250,528.78
Approved within granted limits	287,093.36	
Vacant within granted limits	122.29	
Listed within granted limits	567.67	
Involved in case with St. P. M. & M. Ry. Co., the decision of this office being in favor of H. & Dak. Ry. Co.	39,575.04	
Lands listed by company, but covered by claims which have been held for cancellation	988.02	328,346.38
Net loss to grant		922,182.40
Approved as indemnity	25,118.94	
Approved under Act of June 22-74	800.00	
Selected under Act of June 22-74	637.35	26,556.29
Due as indemnity		895,626.11

95 In explanation of the charges in the statement, I will state that within the granted limits 122.29 acres are vacant and subject to the grant, but have not been listed as yet; also that 464.77 acres have been listed, and the lands are shown by the records to be clear of conflict and subject to the grant.

Until listed, the lands cannot be submitted for approval, and, under the general order of suspension, where the road has been constructed out of time, those listed have been suspended, awaiting the action of Congress in the matter of the forfeiture of the grant.

It will be noticed that the company is charged with lands involved in pending cases, where, under the decision of this office, the company is entitled to the lands, and should any, or all, of these decisions be reversed, the charge, to the extent of the reversal, can be corrected.

As the grant is shown to be largely deficient, such change will not affect the company's claim to further lands, if the same can be found within its limits.

The company has listed 80 acres within the primary limits conflicting with entries and filings, shown by the records to be subsisting claims at the date the right of the road attached under the grant, and its claim as to such tracts has been held for cancellation subject to appeal.

It has also listed 988.02 acres conflicting with entries and filings made at a date subsequent to the attachment of rights under the

grant, and as to these tracts, the entries and filings have been
95 held for cancellation, and should such holding become final,
the lands will become subject to and be properly chargeable to the grant.

The adjustment shows that, of the lands heretofore certified for the benefit of the company, 14,213.64 acres were erroneously certified on account of the existence of claims of record sufficient to except the lands from the operation of the grant, and rules have been served upon the company to show cause why demand should not be made for the reconveyance of such lands to the United States, as contemplated by the Act of March 3, 1887.

When answer has been made, or the time allowed has expired, further report will be made in the matter.

Of the pending selections under the Act of June 22, 1874, 637.35 acres are based upon relinquishments made under said act, of tracts which, under departmental construction, would constitute a proper basis, and, but for the suspension before referred to, could be listed for approval.

In the adjustment the company has, therefore, been charged with these lands.

Applications to select about 119,000 acres, within the indemnity limits, are pending, all of which, with the exception of about 4,000 acres, have been acted upon by this office, and the applications rejected.

The greater part of the same is in conflict with selections by the St. Paul, Minneapolis and Manitoba Ry. Co., and involved in office decision of Sept. 11, 1889, in which the award, as to the in-
97 demnity lands, is in favor of the last mentioned company, and if sustained, it is not likely that the Hastings and Dakota Railway Company will receive any amount of indemnity lands, as it has probably heretofore applied for every vacant tract within its limits.

The pending selections and applications to select will be disposed of at an early date.

Very respectfully, LEWIS A. GROFF,
Commissioner.

(Title.)

The foregoing and annexed proposed case herein is hereby settled and allowed as a case containing all the evidence offered or received upon the trial of said action, and all the proceedings had upon such trial, except that Exhibits "A," "B," "C," "D" and "H" are omitted. The first four because immaterial, and the last because it is a substantial duplicate of Exhibit "F," and such case as so settled contains all the evidence having any bearing upon the decision of said action.

Dated this 14th day of Jan., 1908.

GORHAM POWERS,
District Judge.

98 State of Minnesota, District Court, County of Chippewa, Twelfth Judicial District.

RUSSELL SAGE, as Assignee in Trust of the Hastings & Dakota Ry. Co., Plaintiff,

vs.

PETER FROYSETH, Defendant.

This matter came before the court on the motion of the plaintiff for the substitution of Edward C. Osborn and Joseph J. Slocum in place of Russell Sage, as assignee in trust of the Hastings and Dakota Railway Company, and Lyndon A. Smith appeared for the plaintiff and C. A. Fosnes, Esq., for the defendant, and upon reading and considering the affidavit of the attorney for the plaintiff, and the files on record referred to in the notice of motion, it is ordered that the objections of defendant in said motion be and the same hereby are overruled, and that the motion of the plaintiff in such substitution and for the amendment of the complaint herein be and the same hereby is granted.

It is further ordered the complaint herein shall be deemed to be amended in the particulars set forth in the application hereinbefore referred to without any physical amendment of the same, or
99 any further service of such amendments upon the defendant herein.

It is further ordered that the defendant may file at any time within ten (10) days the objections made by him to the granting of the motion herein referred to.

Dated this 20th day of March, 1907.

GORHAM POWERS,
District Judge.

(Title.)

Findings of Fact and Order for Judgment.

This case was tried by the court, at Montevideo, Minnesota, on the 20th day of March, 1906, and has been finally submitted on briefs.

Lyndon A. Smith appeared as attorney for the plaintiffs, and C. A. Fosnes appeared for the defendant.

From the pleadings, evidence, stipulations and admissions of the parties, the court finds the following

Facts.

First. The Hastings & Dakota Railway Company was created and became a corporation of this state under the laws of Minnesota, as in the complaint alleged.

Second. On July 4th, 1865, the Congress of the United States, by an act approved on that day, granted to the State of Minne-
100 sota certain lands for the purpose of aiding in the construction of a railroad from Hastings in this state to the western bound-

ary thereof, which grant of land was thereafter accepted by the Legislature of Minnesota, and the benefits of said grant were by the Legislature of this state thereafter conferred upon the Hastings & Dakota Railway Company, which company accepted said grant and duly surveyed and definitely located its line of road and caused a map thereof to be transmitted by the Governor of the State to the Secretary of the Interior of the United States, and the said grant has ever since been administered with reference to said map of location, and the said company had the power to construct said line of road and receive said grant; that the time for the construction of said line of railroad was extended by acts of the Legislature of the State of Minnesota to the year 1882, and the said line of road was constructed to completion in the year 1880, and such construction was accepted by the Governor of the State of Minnesota, who certified the same to the Secretary of the Interior, as required by the said grant act, and the allegations concerning all of said facts set out in paragraph two, three, four and five of the complaint are true and correct, and the facts of relation thereto are as stated in said paragraphs of the complaint.

Third. The land in controversy in this action is located within the indemnity limits of the said line of road as definitely located, and the same was withdrawn from settlement for the benefit
101 of said grant on July 12th, 1866, and by a further modified and more definite order of date April 22nd, 1868, and by the line of road of said railway company was constructed past the land in question here in the year 1879, and not before.

Fourth. On May 26th, 1883, the Hastings & Dakota Railway Company attempted to select the land in question, with other lands within the indemnity belt of said grant, in lieu of lands lost within the place or primary limits of the grant, which selection was rejected by the local land office of the district embracing the lands. From such rejection and refusal to allow the attempted selection the company appealed to the Secretary of the Interior, before whom the matter remained pending until October 23d, 1891, when said selection was by him also rejected, the selection so attempted was not made in accordance with the rules and regulations of the Land Department then in force, in this: the said company did not furnish or tender a list of lands lost in place, nor tender the required fees. That the company did not acquire any right by reason of such attempted selection. Said land was then free public land of the United States, subject to the jurisdiction of the United States Land Department, and has continued to be such except as to rights then or since acquired by either party to this action.

Fifth. On July 22, 1890, under the land grant adjustment act of March 3rd, 1887 (24 Stat. 556), said land grant was ad-
102 justed in the Land Department of the United States, and it was correctly found that there existed a deficiency in the place limits of the grant of 922.182 acres, and all of said lands within the indemnity limits applicable to cover such losses were less than 100,000 acres.

Sixth. On May 28th, 1891, pursuant to instruction from the

Secretary of the Interior, of date May 22nd, 1891, the Commissioner of the General Land Office directed the officers of the proper local land office that, after giving thirty days' notice in local newspaper, they should restore to the public domain and open to settlement and entry all the lands in the indemnity limits of said land grant "not embracing selections heretofore made or applied for by said Company."

Seventh. By a judgment of the Supreme Court of the State of Minnesota, given and made on March 23rd, 1887, the Charter and Franchises of the Hastings & Dakota Railway Company were adjudged forfeited, and said corporation dissolved, subject, however, to the statutory period of three years allowed the company to wind up its affairs; that on December 9th, 1889, the said company, by its deed of that date, conveyed and assigned to Russell Sage all its property and all its rights and interest in the land in question, and all the lands embraced within the said land grant in trust for the benefit of all the stockholders of said Company, the deed granting and giving to him the right to maintain and prosecute all actions necessary to carry out the purpose of said trust and assignment,
which trust was accepted by him, and he has ever since
103 acted as trustee until his death. There is no evidence of the appointment of any receiver of said corporation under the laws of this state. I therefore find that no such receiver was appointed.

Eighth. After the rejection of said selection of 1883, and Oct. 29th, 1891, said Sage, under the powers vested in him by said deed of trust, attempted to select the land in question, with other lands on behalf of himself as such trustee and assignee of the Hastings & Dakota Railway Company, which selection was in due form and complied with the rules of the Land Department relating to selections of indemnity lands by companies.

Ninth. That the said Russell Sage, trustee as aforesaid, died on the 22nd day of July, 1906, without having fully administered the trust hereinbefore alleged; that thereafter the District Court in and for the County of Ramsey and State of Minnesota, on the 19th day of December, 1906, appointed as successors to said Russell Sage, as trustee as hereinbefore alleged, and ordered that the title to said lands formerly in said Sage be and they were thereby vested in the said Joseph J. Slocum and Edward C. Osborn; and that on the 20th day of March, 1907, the said Edward C. Osborn and Joseph J. Slocum *were* by an order of this court substituted as plaintiffs in this case.

Tenth. At the time of said selection the land in question was not vacant, but was occupied by the defendant, Peter Froyseth, as hereinafter found.

Eleventh. Said selection was not approved by the Secretary of the Interior until 1901.

104 Twelfth. That the defendant, on the 1st day of November, 1888, declared his intention to become a citizen of the United States, and was after said date in all respects qualified and entitled to make a Homestead Entry under the Laws of the United States

and, on May 15th, 1889, he settled upon and went into possession of the land in controversy with intent to enter upon and claim the same as a homestead, and with the view of making it his home, and has continued in possession and resided thereon ever since, and his residence and improvements were at all times sufficient to comply with the requirements of the homestead laws of the United States, and at the time of the commencement of this action such improvements exceeded in value the sum of Seven Hundred Dollars ($700); that the defendant has never owned or occupied other real estate. That he became a full citizen of the United States on June 9, 1897, and has been such citizen ever since. On the 3rd day of November, 1891, the defendant offered at the proper land office a homestead entry in due form for said land, which filing was refused by the local land officers solely on the ground that said land was withdrawn from settlement by the executive withdrawal of April 22nd, 1868, from which refusal the defendant duly appealed, which appeal remained pending in the land department until September 11th, 1894, on which date the rejection of said filing by the local land officers was affirmed. From the decision of the general land officers the defendant appealed to the Secretary of the Interior, which
105 appeal was pending until the 25th day of January, 1896, when the decision of the general land office of September 11th, 1894, was affirmed. That the defendant did all that was in his power to secure the land as his homestead.

As Conclusions of Law Thereupon.

That the plaintiffs are not entitled to any relief; that the defendant be adjudged to be the owner of the land described in the complaint, and confirming his title thereto as against the plaintiffs.

That defendant recovers his costs and disbursements herein.

Let judgment of the court be entered accordingly.

Dated October 26th, 1907.

GORHAM POWERS,
District Judge.

Endorsed: Filed October 29th, 1907. Elias Jacobson, Clerk of District Court.

(Title.)

This case came before the court on Tuesday, January 14th, 1908, upon plaintiffs' motion that the court amend its findings of fact numbered eleven in the findings hereto made and filed herein, in the manner specified in said motion; Lyndon A. Smith appearing for plaintiffs, and C. A. Fosnes for defendant.

106 Having heard counsel for the respective parties,

It is ordered, that said findings numbered eleven be and hereby is amended by adding thereto the following: "That on the 15th day of June, 1901, the Commissioner of the General Land Office of the United States certified the land in question in this

case pursuant to the selection of October 29th, 1891, for the benefit of Russell Sage, trustee of the assets of the Hastings & Dakota Railway Company, and submitted the certification of said land on said day to the Secretary of the Interior, and the said Secretary of the Interior approved such selection on the 18th day of June, 1900, subject to all its conditions and the valid interfering rights which then existed to any of the tracts of lands described therein."

Dated January 14, 1908.

GORHAM POWERS,
District Judge.

(Title.)

Judgment.

The above entitled action came before the court for trial, without a jury, at Montevideo, Minn., on the 22nd day of March, 1907, and the court having made its order for judgment, which order is now on file in this court, to the effect that the plaintiffs are not entitled to any relief, and that the defendant is the owner of the lands in controversy.

Now, on motion of C. A. Fostnes, Esq., the attorney for the
107 defendant, it is adjudged, decreed and determined that the plaintiffs are not the owners of the lands in the complaint described, to-wit: the Southeast quarter of Section seven (7), Township one hundred nineteen (119), Range forty (40), or entitled to the possession thereof, and that plaintiffs take nothing by this action. It is further adjudged and decreed that the defendant is the owner of said premises, and entitled to the possession of them, and his title thereto as against the plaintiffs is hereby quieted and affirmed; it is further adjudged and decreed that the defendant recover from the plaintiffs his costs and disbursements of this action, taxed and allowed at the sum of forty-three and 90 100 dollars ($43.90).

Dated Aug. 28th, 1908.

By the Court

ELIAS JACOBSON, *Clerk*

(Notice of appeal from Judgment.)

(Waiver of bond.)

108 15849.

State of Minnesota, Supreme Court, October Term, A. D. 1908.

No. 211.

EDWARD C. OSBORN ET AL., Appellants,
vs.
PETER FROYSETH, Respondent.

Per Curiam:

In Osborn *v.* Froyseth, 116 N. W. R. 1113, all the controversies involved in this appeal appear to have been determined adversely to plaintiff and appellant here, and in favor of defendant and respondent. We have examined the paper book and briefs in the case reported *supra* and compared them with the paper book and briefs in the case at bar. Opportunity was given plaintiff to show cause why the decision in that case should not control the decision in the instant case. No such cause has been shown. The conclusion inevitably follows that the former decision determines the issues adversely to plaintiff. In this view, it would be superfluous to consider the additional points which the defendant presents.

Affirmed.

109 15660.

State of Minnesota, Supreme Court, April Term, A. D. 1908.

No. 150.

EDWARD C. OSBORN and JOSEPH J. SLOCUM, Assignee in Trust of Hastings & Dakota Railway Company, Appellants,
v.
PETER FROYSETH, Respondent.

Syllabus.

All selections of indemnity lands under the Hastings and Dakota Railway land grant, prior to that of October 23, 1891, were ineffectual to remove the lands from homestead settlement.

Sage *v.* Maxwell, 91 Minn. 527.

The rule that the decision of the United States land department is conclusive upon the courts as to all questions of fact, has no application to this case.

Affirmed.

110 15660.

State of Minnesota, Supreme Court, April Term, A. D. 1908.

No. 150.

EDWARD C. OSBORN and JOSEPH J. SLOCUM, Assignee in Trust of Hastings & Dakota Railway Company, Appellants,

v.

PETER FROYSETH, Respondent.

Opinion.

This is an action in ejectment and appellants claim title to the premises by virtue of the act of Congress, approved July 4, 1866, known as the Hastings & Dakota Railway land grant. The answer denies the validity of appellants' selection of the lands in the indemnity limits; alleges that respondent was duly qualified to make a homestead entry, and that he entered upon the land in question prior to 1891, with the intention of making a homestead entry thereon; that he duly offered his homestead application at the proper land office, accompanied by a tender of the necessary fees; that the same was disallowed on the pretended claim that it had been selected as indemnity land by the Dakota and Hastings Railway Company, and that before any rights of the company attached in the land, respondent had made repeated applications for homestead entry thereon. The court found that the trustees made a selection in due form on October 29, 1891, but that at the time of such selection the land in question was not vacant but was
111 occupied by respondent; that on November 1, 1888, respondent was duly qualified and entitled to make a homestead entry; that he went into possession of the land with intent to enter upon and claim the same as a homestead, and has ever since remained in possession thereof with such intention; that at the time of the commencement of this action, his improvements exceeded in value the sum of $700; that on November 3, 1891, he offered, at the proper land office, a homestead entry in due form, which was refused solely upon the ground that the land was withdrawn from settlement by the executive withdrawal of April 22, 1868, from which order respondent duly appealed, which appeal remained pending in the land department until September 11, 1894, when the rejection by the local land officers was affirmed by the Commissioner; that respondent appealed from that decision to the Secretary of the Interior who rendered a decision on January 25, 1896, affirming the decision. The court held that respondent had done all in his power to secure the land as a homestead.

It was determined in the case of Sage *v.* Maxwell, 91 Minn. 527, that the several selections by the railway company prior to October 23, 1891, were ineffectual; that the lands were open to public settlement and that the land grant in question did not differ in any of the essential features from the land grants under consideration in

the several cases referred to in that opinion. Every question involved in this appeal, except the following, was decided in that case and we follow it without further comment.

In the Sage-Maxwell case, however, Maxwell was successful in the land department, and his homestead entry was allowed and a patent was issued to him, whereas in the present case the railway company was successful in having its selection of October
112 29, 1891, allowed while the application of respondent was rejected by the land department. Appellants argue that they are entitled to a new trial upon the ground that there is no evidence to sustain the finding of the court that respondent's application to file a homestead upon the land was rejected in the land office solely on the ground that the land was withdrawn from settlement by the executive withdrawal of April 22, 1868. It is the rule that the decisions of the land department are conclusive upon all courts on all questions of fact. Attention was called to this rule in *Sage v. Maxwell*, *supra*, citing the case of Gertgens *v.* O'Connor, 191 U. S. 237, and if it appears from the evidence in the case before us that the land department rejected respondent's application upon the ground that he was not a *bona fide* settler, or that he was not entitled to file a homestead entry for any other reason, then this court would be bound by the decision of the land department upon that question. Appellants insist that because respondent failed to produce direct evidence that the land department did not reject his application upon some ground of disqualification, the presumption is that it was rejected upon some such ground, and that there is no evidence to indicate that respondent's application was denied for the reason that the land was not open to public settlement at the time the trustees made their selection October 23, 1891. It is true that no reference was made, either in the orders or letters of the land department, to the ground upon which respondent's claim was rejected, but in this action there was no controversy whatever as to respondent's *bona fide* settlement and qualifications. The only question at issue was: What was the effect of the order of
113 withdrawal of the lands from public settlement, pending the time the validity of the trustees' selection was under consideration, down to October 23, 1891? In the absence of any evidence to indicate that there ever was any other matter in dispute, it will not be presumed that new issues were raised in this case. On the contrary, it may fairly be presumed that the question here involved was the only one at issue while the parties were contending before the land department.

Affirmed.

114 STATE OF MINNESOTA,
Supreme Court, ss.

I, C. A. Pidgeon, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the opinion in the case of Osborn *vs.* Froyseth, reported in 116 N. W. R., 1113, as appears from the original remaining on file in my office; that I have care-

fully compared the within copy with said original, and that the same is a correct transcript therefrom, and of the whole thereof.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul, this 10th day of March, A. D. 1909.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON, *Clerk*.

115 State of Minnesota, Supreme Court, General October Term, A. D. 1908.

FRIDAY MORNING, 9:30 o'clock, *November* 12, A. *D.* 1908.

Court convened pursuant to adjournment, all the Justices being present.

Reg. No. 15849. Cal. No. 211.

EDWARD C. OSBORN and JOSEPH J. SLOCUM, Assignees in Trust Hastings & Dakota Railway Company, Appellants,

vs.

PETER FROYSETH, Respondent.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision and taken under advisement.

A true record.

Attest:

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON, *Clerk*.

The foregoing is a full and true copy of the Minutes of Argument in the above entitled cause.

Attest:

C. A. PIDGEON, *Clerk*.

116 [Endorsed.] 15849 State of Minnesota, Supreme Court. Copy of Minutes of Argument. Filed March 9th, A. D. 1909. C. A. Pidgeon, Clerk.

117 State of Minnesota, Supreme Court, October Term, A. D. 1908.

No. 211.

EDWARD C. OSBORN and JOSEPH J. SLOCUM, Assignees in Trust Hastings & Dakota Railway Company, Appellants,

vs.

PETER FROYSETH, Respondent.

Appeal from District Court, Twelfth Judicial District, County of Chippewa.

This cause having been duly argued and submitted at the General October Term of this Court, A. D. 1908, upon the return to the appeal herein

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the Court below, herein appealed from, be and the same hereby is, in all things affirmed and that the Respondent above named have judgment accordingly.

Entered March 9th, A. D. 1909.

By the Court,

[Seal of the Supreme Court, State of Minnesota.]

Attest:

C. A. PIDGEON, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original Order for judgment entered in the above entitled cause.

Attest:

C. A. PIDGEON, *Clerk.*

118 [Endorsed:] No. 15849. State of Minnesota, Supreme Court. Copy of Order for Judgment. Filed March 9th, A. D. 1909. C. A. Pidgeon, Clerk. Entered on Page —.

119 State of Minnesota, Supreme Court, October Term, A. D. 1908.

No. 211.

EDWARD C. OSBORN and JOSEPH J. SLOCUM, Assignees in Trust Hastings & Dakota Railway Company, Appellants,

vs.

PETER FROYSETH, Respondent.

Pursuant to an order of Court duly made and entered in this cause, on the 9th day of March, A. D. 1909, it is here and hereby determined and adjudged that the judgment of the Court below, herein appealed from, to wit, of the District Court of the Twelfth Judicial District, sitting within and for the County of Chippewa be and the same hereby is in all things affirmed.

And it is further determined and adjudged that the Respondent above named, do have and recover of said Edward C. Osborn, and Joseph J. Slocum, Assignees in Trust Hastings & Dakota Railway Company, Appellants herein the sum and amount of Fifty-seven and 50 100 Dollars ($57.50) costs and disbursements in this cause in this Court, and that said Respondent have execution for the enforcement thereof.

Dated and signed this 9th day of March A. D. 1909.

By the Court.

Attest:

C. A. PIDGEON, *Clerk.*

Statement for Judgment.

Costs allowed by Statute	$25.00
Clerk's Fees, for making Return	
Printer's Fees	21.75
Clerk's Fees, Supreme Court	10.25
Filing Mandate	
Affidavits and Acknowledgments	.50
	$57.50

120 STATE OF MINNESOTA,
Supreme Court, ss:

I, C. A. Pidgeon, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said Supreme Court at the Capitol, in the city of St. Paul, this 9th day of March A. D. 1909.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON, *Clerk.*

[Endorsed:] State of Minnesota, Supreme Court. Transcript of Judgment. Filed —— A. D. 190-. —— ——, Clerk. —— ——, Attorney for —— —— Page No. —, — Book.

121 State of Minnesota, Supreme Court.

STATE OF MINNESOTA,
Office of Clerk of the Supreme Court, ss:

I, C. A. Pidgeon, Clerk of the Supreme Court, State of Minnesota, do hereby certify and return to the Supreme Court of the United States, that the foregoing and annexed transcript of record is a full and complete transcript of the record, judgment roll and all of the proceedings had in said Supreme Court of the State of Minnesota, in the cause between Edward C. Osborn and Joseph J. Slocum as Trustees of the Hastings and Dakota Railway Company, Appellants, and Peter Froyseth, Respondent, including the opinion of the said Supreme Court in said cause and also the opinion of the Court in Osborn *vs.* Froyseth reported in 116 N. W. R. 1113, as appears from the original files and records.

And I do further certify and return that I have annexed to said transcript and included therewith, and that the foregoing are, true and correct copies of the Petition for Writ of Error with allowance of same, and stipulation and order waiving Bond on appeal, Assignments of Error in said cause, and Petition for Reversal, as the same

remain on file and of record in said Supreme Court of the State of Minnesota, and also the original Writ of Error from the Supreme Court of the United States, and the original Citation issued thereon, with proof of service thereof endorsed thereon, and that the foregoing constitutes a true, full and complete Return to said Writ of Error.

In Witness Whereof I have hereunto set my hand and Seal of said Supreme Court of the State of Minnesota, at the Capitol at St. Paul, Minnesota, this 10th day of March, 1909.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON,
Clerk of the Supreme Court, State of Minnesota.

Endorsed on cover: File No. 21565. Minnesota Supreme Court. Term No. 395. Edward C. Osborn and Joseph J. Slocum, as trustees of The Hastings & Dakota Railway Company, plaintiffs in error, *vs.* Peter Froyseth. Filed March 26, 1909. File No. 21565.

Office Supreme Court, U. S.
FILED.
NOV 6 1909
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 395.

EDWARD C. OSBORN AND JOSEPH J. SLOCUM, AS TRUSTEES OF THE HASTINGS AND DAKOTA RAILWAY COMPANY, PLAINTIFFS IN ERROR,

vs.

PETER FROYSETH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR PLAINTIFFS IN ERROR.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Attorneys for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 395.

EDWARD C. OSBORN AND JOSEPH J. SLOCUM, AS TRUSTEES OF THE HASTINGS AND DAKOTA RAILWAY COMPANY, PLAINTIFFS IN ERROR,

vs.

PETER FROYSETH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement.

This is an action of ejectment brought by Russell Sage, as assignee in trust of the Hastings and Dakota Railway Company, and continued by his successors therein, the present plaintiffs in error. The land involved is the southeast quarter of section 7, township 119, range 40, in Chippewa county, Minnesota, falling within the indemnity limits of the company's grant, and was on June 18, 1900, duly certified and thereby conveyed by the Secretary of the Interior for the benefit of such grant (R., 39).

The case was tried to the court. As appears by the pleadings, the "settled case" duly certified by the trial judge, and the findings of the trial court, the relevant facts are:

By act approved July 4, 1866 (14 Stats., 87), entitled "An act making an additional grant of lands to the State of "Minnesota in alternate sections to aid in the construction "of railroads," Congress granted to the State, to aid (among others) construction of a railroad from Hastings, on the Mississippi river, near the eastern boundary of the State, to the western boundary thereof

> "Every alternate section of land designated by odd numbers to the amount of five alternate sections per mile on each side of said road; but in case it shall appear that the United States have, *when the lines or route of said roads are definitely located*, sold any section or part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, *then it shall be the duty of the Secretary of the Interior* to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the tiers of sections above specified so much land in alternate sections or parts of sections designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached, as aforesaid, which lands thus indicated by odd numbers and sections, *by the direction of the Secretary of the Interior*, shall be held by the said State of Minnesota for the purposes and uses aforesaid."

By act approved March 7, 1867, the legislature of the State accepted the grant, and conferred same upon the Hastings, Minnesota River and Red River of the North Railroad Company, its name being afterward changed to the Hastings and Dakota Railway Company (complaint, R., 8).

The granting act also provided (section 5) that upon

filing by the Governor of the State with the Secretary of the Interior map designating the route of the road, then—

> "it shall be the duty of the Secretary of the In-
> "terior to withdraw from market the lands embraced
> "within the provisions of this act."

Following a then prevailing practice, the lands along the probable line of route were so withdrawn on July 12, 1866, and the Governor having on January 4, 1867, certified to the Secretary of the Interior the map of the definite location of the route of the road, and such map having been officially filed with the Department and accepted by the Secretary on June 26, 1867, with direction to withdraw the lands thereunder (R., 27), such withdrawal was made by Commissioner's letter of April 22, 1868 (R., 28-29), embracing all the odd-numbered sections within both the place and indemnity limits thereof, or, as stated in third finding of the trial court herein (R., 58):

> "The land in controversy in this action is located
> "within the indemnity limits of the said line of road
> "as definitely located, and the same was withdrawn
> "from settlement for the benefit of said grantee on
> "July 12, 1866, and by a further modified and more
> "definite order of date April 22, 1868, and (by) the
> "line of said road of said railway company was con-
> "structed past the land in question here in the year
> "1879, and not before."

And Finding 2 (R., 58) recites:

> "* * * and the said line of road was constructed
> "to completion in the year 1880, and such construc-
> "tion was accepted by the Governor of the State of
> "Minnesota who certified the same to the Secretary
> "of the Interior, as required by the said grant
> "act." * * *

By reason of overlapping and prior grants this grant for the Hastings and Dakota line was largely deficient in quan-

tity, and was always known so to be. The fifth finding of the trial court (R., 58) is:

> "On July 22, 1890, under the land grant adjustment act of March 3, 1887 (24 Stat., 556), said land grant was adjusted in the Land Department of the United States, and it was correctly found that there existed a deficiency in the place limits of the grant of 922,182 acres, and all of said lands within the indemnity limits applicable to cover such losses were less than 100,000 acres."

The detailed statement of this adjustment appears in this record (pp. 54-56).

The road having been built and its completion certified by the Governor of the State to the Secretary of the Interior in 1880, the company, on May 26, 1883, tendered at the proper local land office a list of indemnity selections, including the land here in controversy. Such selection was refused by the local officers, and endorsed by them as follows:

> "This list is refused for the following reasons:
> "1st. There is nothing to show that the Hastings and Dakota Railway Company are entitled to these lands.
> "2nd. These lands are within the limits of the grant to Saint Paul, Minneapolis and Manitoba Railroad Company, and withdrawn for the benefit of that road" (R., 53).

Therefrom appeal was taken (R., 53), and July 24, 1883, the list and appeal was forwarded by the local officers to the Commissioner of the General Land Office by letter, which reads (R., 54):

> "We transmit herewith two lists of lands selected by the Hastings and Dakota Railway Company under act of July 1, 1866, one of said lists being for lands within the ten-mile limits of said road and the other for lands within the twenty-mile limits of said road; office fees tendered and refused.

"We rejected said lists for the reasons thereon en-
"dorsed. The said railway company have appealed
"from our decision and the grounds of appeal are
"also endorsed on the enclosed lists."

We quote this letter in full because in the finding of the trial court herein (Finding 4, R., 58) it is inadvertently stated that the company failed to tender the requisite selection fees to the local land officers and that the subsequent decision of the Secretary of the Interior affirming such rejection was based in part on that ground. The Secretary did not so rule. The sole ground of his action was the failure of the company to designate the specific tracts lost to the grant within the place limits, in lieu whereof these indemnity tracts were selected, as inspection of such decision will show (R., 59), and as officially reported in 13 Land Decisions, pages 140, 147.

The grant for the St. Paul, Minneapolis and Manitoba Company overlapped the grant to the Hastings and Dakota Company, and each company claimed the land so in dispute. The situation is stated clearly in the Commissioner's letter of July 22, 1890, addressed to the Secretary, transmitting the adjustment of the Hastings and Dakota grant noted above, thus (R., 56):

"Applications to select about 110,000 acres within
"the indemnity limits are pending, all of which, with
"the exception of about 4,000 acres have been acted
"upon by this office and the applications rejected.
"The greater part of the same is in conflict with
"selections by the St. Paul, Minneapolis and Mani-
"toba Railway Company, and involved in office de-
"cision of September 11, 1889, in which the award
"as to the indemnity lands is in favor of the last
"mentioned company, and if sustained, it is not
"likely that the Hastings and Dakota Railway Com-
"pany will receive any amount of indemnity lands
"as it has probably heretofore applied for every
"vacant tract within its limits."

That adjustment showed the net loss to the grant within the place limits was 922,182 acres and that the quantity approved as indemnity was but 25,118 acres (R., 55). The Commissioner had rejected *all* of the company's indemnity list of May 26, 1883, as his letter just quoted shows, and added that if his decision was affirmed by the Secretary (where the case was then pending on appeal) "it is not "likely that the Hastings and Dakota Railway Company "will receive any amount of indemnity lands, as it has "probably heretofore applied for every vacant tract within "its limits" (R., 56).

This was not probability, but *certainty*, because, as found by the trial court, and quoted *supra* (R., 58), for this deficiency of 922,182 acres in the place limits, "all of said lands "within the indemnity limits applicable to cover such losses "were less than 100,000 acres."

With this adjustment before him, however, on October 23, 1891, the Secretary rejected the Hastings and Dakota Company's selections of May, 1883, *solely* because it was "unaccompanied with a designation of losses" (R., 50; also Finding 4, R., 58). And, ruling against the selection of the St. Paul, Minneapolis and Manitoba Company for like reason, his decision concluded:

> "The orders of withdrawal of indemnity lands for "these companies having been revoked (12 L. D., "541) and there being no valid selection of the lands "by either company, you will hold the same subject "to entry by the first legal applicant, or to selection "by the company first presenting applications there-"for in the manner prescribed by the regulations gov-"erning such selections." (R., 50; Finding 4, R., 58).

Before the Secretary's decision was rendered the Hastings and Dakota Company had been dissolved at the suit of the State and Russell Sage appointed trustee of its assets (complaint, pars. X and XI, R., 10; Finding 7, R., 59). Immediately on rendition of the Secretary's decision of

October 23, 1891, the said trustee reselected this land, the complaint herein averring (par. XII, R., 10-11):

> "That by reason of certain objections made to the "selections of 1883, this plaintiff, without admitting "the validity of such objections and without waiving "any rights gained by said railway company under "its said selections of 1883, caused a reselection to "be made of the same lands which had been made "in 1883, as aforesaid, and for the same purpose as "the selections of 1883, heretofore referred to, and "the said reselections were made on October 29, "1891, and the tract of land described in this com- "plaint was duly reselected by plaintiff on said last "mentioned date. That thereafter certain of the "tracts selected in 1883 and reselected in 1891 as "aforesaid and, among them the tract described in "this complaint were duly certified by the Secretary "of the Interior to the State of Minnesota, in com- "pliance with and for the purposes of the said act of "July 4, 1866, and said list was, on June 18, 1900, "duly submitted to and approved by the Secretary "of the Interior and the lands therein contained in- "cluded the tract described in this complaint and "said certification was, and was therein stated to be, "for the benefit of plaintiff as the trustee of the Hast- "ings & Dakota Ry. Co."

Copy of this selection list appears herein (Ex. M. R., 34-36). The finding of the trial court thereon is:

> "Eighth. After the rejection of said selection of "1883 and October 29, 1891, said Sage, under the "powers vested in him by said deed of trust at- "tempted to select the land in question, with other "lands on behalf of himself as such trustee and "assignee of the Hastings & Dakota Railway Com- "pany, which selection was in due form and com- "plied with the rules of the Land Department relat- "ing to selections of indemnity lands by companies" (R., 59).

And by the eleventh finding the trial court gives the date of the Secretary's approval of this selection as 1901, a manifest, although unimportant, error, as the certification found in the record (R., 39) is plainly dated June 18, 1900.

The defendant's statement of his own claim appears in the eleventh paragraph of his answer (R., 15) thus:

> "Defendant further answering alleges that he is "and at all times since July 18, 1891, *he* has been a "citizen of the United States, and as such was fully "qualified to make a homestead entry upon any of "the free public lands of the United States subject "to the operation of the homestead laws of the "United States; that at all times mentioned in the "complaint and answer the land described in com-"plaint was free public lands of the United States, "which had not been sold, reserved or otherwise ap-"propriated, but which during all of said time was "subject to entry by any qualified homestead claim-"ant. That prior to the year 1891 the defendant "entered upon the tract of land described in the "complaint with the intent in good faith to make "entry thereof as a Government homestead under "the United States homestead laws, being advised "that whatever claim had theretofore existed to said "land in favor of said Hastings & Dakota Railway "Company was or would soon be entirely extin-"guished, and that there would then be nothing in "the way of the allowance of his homestead entry "therefor in the United States Land Office. That at "the time of said settlement thereon defendant con-"structed thereon a house, barn and other buildings "and improvements reasonably worth and of the "value of one thousand dollars ($1,000.00) and then "and there established his residence thereon, which "he has continued without interruption since. That "the defendant duly offered a homestead application "for said land in due form of law at the proper local "United States land office, accompanied by the ten-"der of all necessary fees, but that the same was dis-"allowed on the pretended claim that it had been "selected as indemnity lands by the Hastings & Da-"kota Railway Company; that said pretended selec-

"tion was void and of no effect, and that the rejec-
"tion of his homestead application was erroneous.
"That the defendant before any rights of said rail-
"way company had attached to said land made re-
"peated applications for homestead entry thereon.
"That the defendant has always maintained and still
"maintains that he has a right to enter said land as a
"homestead, and that the plaintiff has no right,
"title or interest thereon, but that the defendant's
"rights are superior."

The finding of the trial court thereon is as follows (R. 59-60):

"Twelfth. That the defendant, on the 1st day of
"November, 1888, declared his intention to become a
"citizen of the United States, and was after said date
"in all respects qualified and entitled to make a
"homestead entry under the laws of the United
"States, and, on May 15th, 1889, he settled upon
"and went into possession of the land in controversy
"with intent to enter upon and claim the same as a
"homestead, and with the view of making it his home,
"and has continued in possession and resided thereon
"ever since, and his residence and improvements
"were at all times sufficient to comply with the re-
"quirements of the homestead laws of the United
"States, and at the time of the commencement of
"this action such improvements exceeded in value
"the sum of seven hundred dollars ($700); that the
"defendant has never owned or occupied other real
"estate. That he became a full citizen of the United
"States on June 9, 1897, and has been such citizen
"ever since. On the 3rd day of November, 1891,
"the defendant offered at the proper land office a
"homestead entry in due form for said land, which
"filing was refused by the local land officers solely
"on the ground that said land was withdrawn from
"settlement by the executive withdrawal of April
"22nd, 1868, from which refusal the defendant duly
"appealed, which appeal remained pending in the
"Land Department until September 11th, 1894, on
"which date the rejection of said filing by the local
"land officers was affirmed. From the decision of

> "the General Land Officers the defendant appealed to
> "the Secretary of the Interior, which appeal was
> "pending until the 25th day of January, 1895, when
> "the decision of the General Land Office of Septem-
> "ber 11th, 1894, was affirmed. That the defendant
> "did all that was in his power to secure the land as
> "his homestead."

As conclusions of law the trial court held:

> "That the plaintiffs are not entitled to any relief;
> "that the defendant be adjudged to be the owner of
> "the land described in the complaint, and confirm-
> "ing his title thereto as against the plaintiffs."

Motion for new trial was made and denied. Thereupon appeal was taken to the State Supreme Court, when the order denying such motion was affirmed (116 N. W. R., 1113). Upon remittitur judgment was entered, appeal taken to the State Supreme Court, and upon the authority of the former decision such judgment was affirmed (R., 62, 63). The opinion of the State Supreme Court upon such first appeal also appears in this record (R., 62-64). And from the final judgment so entered (R., 63) the present writ of error is taken.

The decision of the State Supreme Court herein rests almost wholly upon that court's prior decision in *Sage v. Maxwell*, the court here observing (R., 63-64):

> "It was determined in the case of *Sage v. Maxwell*,
> "91 Minn., 527, that the several selections by the
> "railway company prior to October 23, 1891, were
> "ineffectual; that the lands were open to public set-
> "tlement and that the land grant in question did not
> "differ in any of the essential features from the land
> "grants under consideration in the several cases re-
> "ferred to in that opinion. Every question involved
> "in this appeal, except the following, was decided
> "in that case and we follow it without further com-
> "ment."

The case of *Sage v. Maxwell* involved a tract of indemnity land within this grant embraced (as here) in the selections of 1883 and 1891. But, as observed by the court in its decision in present case, in the Maxwell case the Secretary of the Interior decided in Maxwell's favor and gave him patent, while here the Secretary ruled against Froyseth, and conveyed the land to the State for the benefit of the railroad grant. Because it did not affirmatively appear upon what ground the Secretary so ruled and acted in present case, the court declared the only other question at issue here was

> "What was the effect of the order of withdrawal "of the land from public settlement pending the "time the validity of the trustee's selection was under "consideration, down to October 23, 1891? In the "absence of any evidence to indicate that there ever "was any other matter in dispute, it will not be pre- "sumed that new issues were raised in this case. On "the contrary, it may fairly be presumed that the "question here involved was the only one at issue "while the parties were contending before the Land "Department."

We recite all this in full because, as we shall endeavor to show, it does affirmatively appear in this record why the Secretary of the Interior *necessarily* ruled in our favor, and a conclusion, we may properly add, in full accord with the truth if the full official action of the Department in this controversy can be made to here appear.

Assignment of Errors.

The assignment of errors accompanied the writ of error and appear in the record (R., 1-5), and are as follows:

I.

The court erred in rendering a judgment affirming the judgment herein by the District Court of the Twelfth Judicial District of the State of Minnesota in favor of the defend-

ant in said district court (respondent herein), and in adjudging that said respondent recover of said appellants their costs and disbursements, whereas the judgment of said district court should have been reversed on account of the following errors occurring upon the trial of said cause in said district court, viz:

II.

In holding that respondent's filing was refused by the local land officers solely on the ground that said land was withdrawn from settlement by the executive withdrawal of April 22, 1868.

III.

In holding that the respondent is the owner of the land described in the complaint and ordering judgment accordingly.

IV.

In finding that the land in controversy was, on October 23, 1891, free public land of the United States, subject to the jurisdiction of the United States Land Department, and has continued to be such, except as to rights then or since acquired by either party to this action.

V.

In holding that the Hastings and Dakota Railway Company did not acquire any right to the land in question by reason of its attempted selection of 1883.

VI.

In holding that the Hastings and Dakota Railway Company did not acquire any right to the land in question by reason of its selection of October 29, 1891.

VII.

In receiving in evidence Defendant's Exhibit 2, being a copy of respondent's homestead application of November 3, 1891.

VIII.

In receiving in evidence Exhibit 3, being a letter of the register of the local land office notifying respondent of the rejection of his application by the Commissioner.

IX.

In receiving Exhibit 4 in evidence, being a letter from the local land office in Marshall, Minnesota, notifying respondent of the decision of the Secretary of the Interior affirming the decision of the Land Commissioner relative to the land in question.

Discussion thereof in proper order falls under three heads.

1st. The validity of the company's original selection of May 26, 1883.

2d. The legal effect of the selection of October 29, 1891, as against the defendant in error.

3d. The legal effect of the defendant in error's alleged settlement during existence of the withdrawal made pursuant to the direction of the granting act.

ARGUMENT.

I.

The Validity of the Company's Original Selection of May 26, 1883.

The following considerations are significant and, we submit, controlling:

1st. The language of the granting act of July 4, 1866, expressly directs, after the making of the grant *in place*, as it is called,

> "but in case it shall appear that the United States
> "have *when* the lines of route of said roads are defi-
> "nitely located, sold any section or part thereof,
> "granted as aforesaid, or that the right of pre-emption
> "or homestead settlement has attached to the same, or
> "that the same has been reserved by the United States
> "for any purpose whatever *then* it shall be the duty
> "of the Secretary of the Interior to cause to be se-
> "lected for the purpose aforesaid from the public
> "lands of the United States nearest to the tiers of sec-
> "tions above specified so much land in alternate sec-
> "tions or parts of sections designated by odd numbers,
> "as shall be equal to such lands as the United States
> "have sold, reserved or otherwise appropriated or to
> "which the right of homestead or pre-emption settle-
> "ment has attached as aforesaid, which lands thus
> "indicated by odd numbers and sections *by the direc-*
> "*tion of the Secretary of the Interior* shall be held
> "by the said State of Minnesota for the purposes and
> "uses aforesaid."

The direction of the statute that *when* by definite location the lands granted are identified and the lands so excepted are likewise thereby identified the Secretary of the Interior shall *then* cause to be selected the indemnity lands in lieu thereof are manifestly correlative terms and plainly describe the

time when such designation shall be made by the Secretary. And this is emphasized by the additional provision that such designated indemnity tracts shall be held by the grantee State for the purposes of the grant, and still further by the provisions of section 4, which, while limiting conveyance of the place lands opposite each section of road as same was completed, expressly provides "that the coterminous principle " hereby applied shall not extend to such lands as are taken " by the said railroad companies to make up deficiencies."

And such was the practical construction given to these railroad grants cotemporaneous with their early enactment in the administration thereof by the Land Department. Upon definite location the grants were immediately adjusted, the lands falling within the excepted classes promptly ascertained, and the Secretary approved lists of indemnity lands to satisfy the quantity granted. Under such practice the full intent of Congress was promptly executed and the grant fully adjusted. In the earlier reports of the Commissioner of the General Land Office illustrations abound showing this practice. Had these precedents been followed much labor would have been saved the courts and the integrity of the grants preserved. Applied to the present grant, it would have been then ascertained what was in fact known, that the grant was largely deficient and not capable of being satisfied. The adjustment made in July, 1891, twenty-five years after the grant and twenty-four years after the date of definite location, was but a tardy declaration of a *fact* existent from the date of definite location, for the adjustment was not a *then* ascertainment of such deficiency, but only the declaration of what had existed as a fact for twenty-four years previously.

2d. But if it be said that the State was not entitled to receive the indemnity lands until the grant had been fully earned by construction of the road, the ready answer is that such construction had been completed as early as 1880, and

the proof thereof presented by the granting act—the Governor's certificate—was then filed with the Secretary of the Interior, eleven years before such adjustment of July, 1891. Certainly all available lands, both place and indemnity, had been fully earned, and the hopeless deficiency of some 800,000 acres existed as a fact.

3d. So that when the company tendered its selection of all available indemnity lands on May 26, 1883, the grant being then as theretofore so enormously and hopelessly deficient, there could be no possible need for the designation of losses tract for tract. The company had lost over eight times the amount of available indemnity. The withdrawal for its benefit was then in full force, and any reasonable diligence in action upon its selection could have demonstrated in exact figures the already existing fact that designation of losses was wholly unnecessary. That was a rule promulgated in 1879 by the Department to meet the mistaken application of the decision of this court rendered in 1884 in *Railroad Company v. Barney* (113 U. S., 624), which it was assumed had ruled that indemnity was due only for losses occurring between the date of the grant and the date of definite location, an error of short duration, for in the same case coming before the court in 1886 (117 U. S., 228) the former misapprehension was removed and the correct rule plainly expressed. In that connection and in the later case the court said (p. 232):

> "In the construction of land grant acts, in aid of "railroads, there is a well-established distinction ob- "served between 'granted lands' and 'indemnity "lands.' The former are those falling within the "limits specially designated, and the title to which "attaches when the lands are located by an approved "and accepted survey of the line of the road filed in "the Land Department as of the date of the act of "Congress. The latter are those selected in lieu of "parcels lost by previous disposition or reservation "for other purposes and the title to which accrues "only from the time of their selection."

Now, in the present case our title *had* so accrued from "the time of their selection," because when the line of definite location was filed and accepted on June 26, 1867 (R., 27), it did then appear by the records of the United States Land Department that this grant was deficient over 900,000 acres, and it did *then* appear that there was only about 100,000 acres available in the indemnity limits to satisfy this enormous loss. To rule *contra* is to declare that the purpose of Congress and the plain terms of the grant are defeated by a mere regulation of the Department, requiring the company to designate losses when *all* available indemnity lands would equal only about one-eighth of such loss.

This court has ruled upon just such a situation as is here presented, for in *St. Paul & Pacific vs. Northern Pacific*, 139 U. S., 1, it was said (page 19):

> "As to the objection that no evidence was pro-
> "duced of any selection by the Secretary of the In-
> "terior from the indemnity lands to make up for the
> "deficiencies found in the lands within the place
> "limits, it is sufficient to observe that all of the lands
> "within the indemnity limits only made up in part
> "for these deficiencies. There was, therefore, no
> "occasion for the exercise of the judgment of the
> "Secretary in selecting from them *for they were all*
> "*appropriated*."

While this case was ruled as between conflicting railroad companies, it is obvious the principle has equal application here as against the United States and one claiming under them, for *here* not only was there an excess of deficiency for which no indemnity was available, but *all* the indemnity lands so available had been selected by the company; the land so selected had been withdrawn for the benefit of the grant under the express command of the granting act, *supra*, and that withdrawal was not revoked until in May, 1891, and not then, as will later appear, as to those *selected* lands, for they were expressly excepted from such revocation (Finding 6, R., 58-59).

4th. Still further: As shown, *supra*, from this record, the official adjustment of this grant was submitted to the Secretary by the Commissioner on July 22, 1891 (R., 54-56). It showed the grant deficient 922,182 acres, and only 25,118 acres indemnity lands approved in satisfaction thereof, or a net deficiency of some 897,000 acres. The same statement from the Commissioner advised the Secretary in terms (R., 56) that the company had applied to select some 110,000 acres of indemnity lands (meaning the selections of May 26, 1883) which the Commissioner had rejected, and from his action appeal was then pending by this company before the Secretary, for the Commissioner's letter to the Secretary so transmitting this adjustment on July 2, 1890, states (R., 56):

> "The greater part of the same is in conflict with
> "selections by the St. Paul, Minneapolis and Mani-
> "toba Railway Company, and involved in office de-
> "cision of September 11, 1889, in which the award,
> "as to the indemnity lands, is in favor of the last-
> "mentioned company and if sustained it is not likely
> "that the Hastings and Dakota Railway Company
> "will receive any amount of indemnity lands, as it
> "has probably heretofore applied for every vacant
> "tract within its limits."

Now, with this official adjustment before him, with the knowledge therefrom that the company's grant was so enormously deficient, when, in the most conclusive manner, this fact had been ascertained, and as expressly set forth in the findings herein (fifth finding, R., 58), and with the duty plainly prescribed under the granting act, "to cause to be selected" indemnity lands to satisfy such great loss, *nevertheless* the Secretary, on October 23, 1891, rejected these selections because, and only because, the company had not designated specific losses tract by tract, when as ruled by this court in *St. Paul & Pacific vs. Northern Pacific*, *supra*, all the lands so selected "only made up in part for these deficiencies."

We submit that when prior to his decision rejecting our selections the Secretary had been officially advised by his own subordinate of the adjustment and its resulting figures, the law required his *then* approval of our selections and could not in any view justify his rejection thereof. The company had built the road; had performed the condition of the grant. The Government was asked to give us but about one-ninth of the indemnity due under the grant. The loss was *then* certainly ascertained. To rule that notwithstanding all this our selections must be rejected because of failure to do a useless thing, viz., designate specific losses was, we submit, most obvious error. Designation of losses could only be required to prevent duplicate certification on account of the same loss. That was its plain purpose. But when the Secretary rejected our selections such duplication was impossible, for the grant was *then* certainly demonstrated to be woefully deficient. Acceptance of the company's selection would have made this error impossible. Hence the question is directly relevant and stands at the forefront for decision. As matter of plain law and plain justice we submit it can be answered but in only one way.

II.

The Legal Effect of the Selection of October 29, 1891, as Against the Defendant in Error.

If we are sustained in foregoing contention further discussion is unnecessary. But in support of this assigned error we submit:

1. The express finding is (R., 59) that the selection of October 29, 1891, "was in due form and complied with the "rules of the Land Department relating to selections of in-"demnity lands by companies."

At that date there was no record of *any* claim by defendant in error to the land. The twelfth finding (R., 60) is that

"on the 3rd day of November, 1891, the defendant offered "at the proper land office a homestead entry in due form "for said land * * *," and there is no finding that he ever presented a homestead application at any other time, earlier or later.

The homestead application he did present on November 3, 1891, is in this record (Exhibit 2, R., 14-15). It is dated November 3, 1891, and is accompanied by his "homestead affidavit," also executed before the register on the same date, November 3, 1891, wherein he avers only in respect to his settlement *"that he resides on the said described land."*

When he settled thereon was not disclosed and the legal effect of the affidavit was simply to declare that his settlement and affidavit were of cotemporaneous date.

This was the record presented to the local officers, the Commissioner and Secretary, in turn. It showed beyond cavil that on October 29, 1891, when our selection was made, there was then no record claim of any one adverse thereto. The homestead application of defendant in error was effective only from its date, and in the accompanying homestead affidavit, which the law required, he alleged only that on the date such affidavit was made—November 3, 1891—he was then residing thereon. When he settled did not appear. He could readily have made it so appear had he chosen so to do, for by the act of May 14, 1880 (21 Stats., ch. 89, p. 140), amending the homestead law, it was provided that any settler who had settled or should thereafter settle

> "with the intention of claiming the same under the "homestead laws, shall be allowed the same time to "file his homestead application and perfect his orig- "inal entry in the United States Land Office, as is "now allowed to settlers under the pre-emption laws "to put their claims on record, and his right shall "relate back to the date of settlement, the same as if "he settled under the pre-emption laws."

The then existing pre-emption law gave the settler three months after settlement wherein to make his filing, and to declare therein the date of his original settlement (section 2265, U. S. Rev. Stats.). The same opportunity was open to the defendant in error *had he chosen so to do*. But he omitted this vital matter and came before the Department *by his own election*, with his homestead papers setting forth a date of settlement *subsequent* to the railroad selection of October 29, 1891. On such a record the Department could not do otherwise than reject his claim. That was precisely what was done, and properly done. The twelfth finding (R., 60) recites that he appealed from the action of the local officers rejecting his application; that on September 11, 1894, the Commissioner affirmed such rejection, and on his further appeal the Secretary in turn affirmed the Commissioner's action. The record here does not contain copies of these decisions, but the distinct reference thereto by dates, we submit, should give full opportunity for their inspection here, (1) because the regularity and validity of our title is presumed until the contrary is shown, and (2) plain justice requires that the full fact should be made to appear thereby, because the finding as it now stands in legal effect incorporates those decisions therein. We present herewith copies thereof duly certified according to law, and print them as an appendix hereto.

The relevant statement of the Commissioner's decision is:

> "None of the applicants allege that the lands were "settled upon either by themselves or others at the "date of the said selections in October, 1891, by the "Hastings and Dakota Company, nor do the records "show that the lands were otherwise than vacant and "subject to such selection at said date."

When this decision was rendered the defendant in error was duly notified, and took due appeal. Thereby he was fully advised of the ground of the Commissioner's decision and given ample opportunity to then come in and amend his

affidavit of settlement by averring another date. The rules and practice of the Land Department are most liberal in that regard. But he chose not to do so; took his appeal upon the same record and accepted the final decision of the Secretary of the Interior upon a statement of facts of his own voluntary creation. Having thus had his full day in court and before the tribunal of unquestioned jurisdiction, should he *now* be heard to deny the verity of the record so made by him, and after *adjudication* of his case in the proper forum endeavor to set up a *new* and different state of facts? No fraud or surprise is suggested on this record, and, indeed, cannot be. The defendant in error was untrammeled in that regard. We submit that having thus acted, and the title having passed to us upon the record *made by him*, he is clearly estopped from now asserting a new or different state of facts. In the case before the Department there was complete identity of parties and subject-matter with that now at bar, and it cannot be that one may litigate in one forum upon one state of facts made by his voluntary statement and choice, and when defeated there and title has passed as the result of *that* judgment then attempt to assert against that title and that judgment a new and different state of facts in order to defeat the former action and the title made thereunder. It has long been the settled rule of this court that facts so found by the Secretary of the Interior are not, in the absence of fraud or legal mistake, thereafter open to judicial review. The leading case of *Johnson v. Towsley*, 13 Wall., 72, announced that doctrine, and it has been always applied in cognate cases.

In discussing the conclusive effect of a patent and the power of judicial review of the action of the Land Department in issuing the same, the court in that case (*inter alia*) observes (page 86):

> "On the contrary, it is fully conceded that when
> "those officers decide controverted questions of fact,
> "in the absence of fraud, or impositions or mistake,

"their decision on those questions is final, except as "they may be reversed on appeal in that Department. "But we are not prepared to concede that when, in "the application of the facts as found by them, they, "by misconstruction of the law, take from a party "that to which he has acquired a legal right under the "sanction of those laws, the courts are without power "to give any relief."

It is obvious this case does not fall within the exception thus stated in foregoing opinion. The defendant in error made his own statement or showing of fact, and thereon the Commissioner and Secretary, in turn, ruled in full accord with the settled law.

That controversies between railroad grants and adversary claimants under the settlement laws should be determined by the *record* has long been the settled doctrine of this court. The case of *Turpey v. Madsen*, 178 U. S., 245, broadly so rules upon authority of numerous prior adjudications of this court. Indeed the cited case is so parallel with the case at bar that we quote freely therefrom.

That case involved title to a tract within the primary limits of the grant to the Central Pacific Railroad. The title of the company was denied upon the ground that the land was occupied by a settler at date of the attachment of the grant, who had, however, made record filing thereafter, alleging settlement at a date *subsequent* to that on which the railroad right so attached. It appeared that when the original claimant settled there was no local land office wherein he could make his filing. As observed by the court (page 220):

"But when the office was opened he filed his declaratory statement, and in that he did not suggest that "he had been in the occupation of the premises prior "to October 20, 1868, but declared that on the 23d of "April, 1869, he settled and improved the tract. "Assume that such declaration was subject to correction by him, that he could thereafter have corrected the mistake (if it was a mistake) and shown "that he occupied the premises prior to October 20,

"1868, with an intent to enter them as a homestead "or pre-emption claim, he never did make the cor- "rection, and there is nothing in the record to show "that this occupation prior to April 23, 1869, was "with any intent to acquire title from the United "States."

Again (page 222) the court says:

"It is undoubtedly true that one occupying land "with a view of pre-emption is given thirty days "within which to file with the register of the land "office his declaratory statement (Rev. Stat., sec. "2264), and since 1880 the same right has been pos- "sessed by one desiring to make a homestead entry. "Act of May 14, 1880, 20 Stat., c. 89, sec. 3. So that "any controversy between two occupants of a tract "open to pre-emption and homestead entry is not de- "termined by the mere time of the filing of the re- "spective claims in the land office, but by the fact "of prior occupancy, and these controversies are of "frequent cognizance. Oral evidence, therefore, of "the date of occupancy may be decisive of the contro- "versy between such individual applicants for a tract "of public land, but by decisions of this court, run- "ning back to 1882, as between a railroad company "holding a land grant and an individual entryman "the question of right has been declared to rest not "on the mere matter of occupancy, but upon the state "of the record. All the cases in this court, in which "this question has been discussed and the conclusion "announced, have been since the act of 1880, giving "to persons seeking a homestead the same rights in "respect to occupancy as to persons intending a pre- "emption."

The opinion then reviews at length the prior cases ruled in this court upon the point, and concludes (page 228):

"Recapitulating, we are of opinion that a proper in- "terpretation of the acts of Congress making railroad "grants like the one in question requires that the rela- "tive rights of the company and an individual entry- "man, must be determined, not by the act of the com-

"pany in itself fixing definitely the line of its road,
"or by the mere occupancy of the individual, but by
"record evidence, on the one part the filing of the
"map in the office of the Secretary of the Interior,
"and, on the other the declaration or entry in the
"local land office. In this way matters resting on oral
"testimony are eliminated, a certainty and definite-
"ness is given to the rights of each, the grant be-
"comes fixed and definite; and while, as repeatedly
"held, the railroad company may not question the va-
"lidity or propriety of the entryman's claim of rec-
"ord, its rights ought not to be defeated long years
"after its title had apparently fixed, by fugitive and
"uncertain testimony of occupation; for if that be the
"rule, as admitted by counsel for defendant in error
"on the argument, the time will never come at which
"it can be certain that the railroad company has ac-
"quired an indefeasible title to any tract."

We submit this rule and conclusion is fully applicable here. In this case, as in that, the settler made his own record, plainly showing a record claim *subsequent* in time to that asserted under the railroad grant. He never sought to amend that record showing in the Land Department, but permitted the title to issue under the railroad grant and selection. Should he now be heard to attack that title in *this* proceeding? We submit the rule applied in *Turpen v. Madsen, supra*, applies in respect of indemnity lands precisely as in respect of place lands—*i. e.*, from date of proper selection in the one case and the date of approved definite location in the other. On principle it is clear that there can be no distinction which would preclude the full operation of this settled rule to the case at bar. The defendant in error made his own record in the Land Department; thereby he clearly presented a claim subordinate in time and right to the then accepted selection under the railroad grant. We submit he falls within the rule expressed in *Maddox v. Burnham*, 156 U. S., 544, 548, that—

> "Leniently as the conduct of a settler is always re-
> " garded by the courts, it cannot be that such leniency
> " will tolerate the omission by him of any of the sub-
> " stantial requirements of the statute in respect to the
> " creation of rights in the public lands."

The act of May 14, 1880, *supra*, plainly required this defendant in error, in presenting his homestead application, to show upon the record the date of his alleged settlement, if he sought to initiate a right thereby prior in time to the date of his homestead application. In other words, the statute required him to place his full claim of record. Having failed to do this, and voluntarily chosen to date his initiation of right only from the date of his homestead application, and having based the full adjudication of his right before the Land Department on that record, we submit again that he is thereafter estopped from asserting some other and different claim. The rule of estoppel in this regard is well settled. It was applied by this court to the United States in *United States v. Cal. & Ore. Land Company* (192 U. S., 355). We submit that, on principle, it must equally apply to a claimant under the United States who has thus failed to make the full record which the statute requires. The result of his omission cannot be visited upon others to the prejudice of a title made by the United States in full accord with the record and the law.

III.

The Legal Effect of the Defendant in Error's Alleged Settlement During Existence of the Withdrawal Made Pursuant to the Direction of the Granting Act.

By section 5 of the act of July 4, 1866, making the grant here involved, it was provided:

> " That as soon as the Governor of said State shall
> " file or cause to be filed with the Secretary of the

> "Interior, maps designating the routes of said roads,
> "then it shall be the duty of the Secretary of the
> "Interior to withdraw from market the lands em-
> "braced within the provisions of this act."

And, as shown above, the express finding of the trial court herein is (Finding 3, page 58) that the land here in question was withdrawn from settlement for the benefit of said grant on July 12, 1866, and by a further modified and more definite order of date April 22, 1868.

The sixth finding recites (page 58) that—

> "On May 28th, 1891, pursuant to instruction from
> "the Secretary of the Interior, of date May 22, 1891,
> "the Commissioner of the General Land Office di-
> "rected the officers of the proper local land office that,
> "after giving thirty days' notice in local newspapers,
> "they should restore to the public domain and open
> "to settlement and entry all the lands in the in-
> "demnity limits of said land grant *'not embracing*
> "*'selections heretofore made or applied for by said*
> "*'company.'*"

The twelfth finding recites that the defendant in error settled on this land on May 15, 1889. His settlement, as thus found, was, therefore, made at a time when the land was in fact and law reserved therefrom, and held subject to the satisfaction of the railroad grant.

It is hence obvious that his settlement was made in violation of law. Nor did the attempted revocation of the withdrawal in 1891, *supra*, cover in its effect the land here in question, because, as shown by the record, the railroad company had on May 26, 1883, applied to select this land as part of its grant, and that application was then pending before the Secretary of the Interior, and so remained until that officer's decision of October 23, 1891, rejecting the same. There was hence no period of time between the date of the defendant in error's alleged settlement of May 15, 1889, down to October 23, 1891, when he could have made lawful settlement

upon this tract. By a long series of cases, too numerous to here cite, it has been over and over again ruled by this court that such a withdrawal (even when unauthorized by the granting act, as in the Iowa land cases) operated to reserve the land from settlement and sale during the continuance of such withdrawal. The settled rule is most concisely stated in *Wood v. Beach* (156 U. S., 548-551), wherein the effect of such withdrawals, though unauthorized by the granting act, was reaffirmed, the opinion quoting, in turn, from *Wolsey v. Chapman*, 101 U. S., 755-768, and adding that the fact was that the railroad indemnity withdrawal involved in *Wood v. Beach* was directed in plain terms by the granting act, precisely as in the case at bar.

After reciting the requirements of the granting act in this regard the opinion concludes:

> "The map of the line of definite location called
> "for by this section was filed on December 6, 1866,
> "and the withdrawal followed in the succeeding
> "spring.
>
> "Upon these admitted facts it is clear that Mr.
> "Wood acquired no equitable rights by his occupa-
> "tion and settlement. He went upon lands which
> "were not open to homestead or pre-emption entry,
> "and cannot make his unauthorized occupation the
> "foundation of an equitable title. He was not acting
> "in ignorance but was fully informed both as to
> "the fact and the law. He deliberately took the
> "chances of the railway company's grant, being satis-
> "fied out of lands within the place limits, or by selec-
> "tions of lands within the indemnity limits other
> "than this, and trusted that in such event this tract
> "would be restored to the public domain and he gain
> "some advantage by reason of being already on the
> "land. But the event he hoped for never happened.
> "The party for whose benefit the withdrawal was
> "made complied with all the conditions of title and
> "took the land."

That is the precise state of facts appearing here.

But it may be contended that after the Secretary's de-

cision of October 23, 1891, rejecting the railroad company's selections of 1883, and under the express terms of that decision holding the land "subject to entry by the first legal "applicant or to selection by the company first presenting "application therefor" (R., 50, Finding 4, page 58), the defendant in error could claim priority by reason of his mere occupancy of the land, which would make his legal right antedate the railroad selection of October 29, 1891 under which this land was conveyed to the State for the benefit of the grant. But it must be remembered that following the attempted revocation of this withdrawal by the Commissioner's instructions of May, 1891, the defendant in error was under the act of May 14, 1880, *supra*, required to make his homestead application within three months thereafter, because the requirement of the pre-emption law (section 2265, U. S. Rev. Stat.), to which the act of 1880, in express terms, assimilates the homestead claimant's right and duty, provides, in legal effect, that if such filing is not made within three months after settlement, or, as a plain consequence, within three months after the land is subject to such settlement and filing, the right of the claimant is forfeited in favor of any subsequent settler who may settle and make the required statutory filing within the time prescribed. Plainly, this defendant in error omitted wholly so to do, and when he offered his filing on November 3, 1891, he *then* made no claim of settlement anterior thereto, and the selection under the railroad grant being the first claim of record became thereby prior both in time and right.

But beyond all this, there is a plain and conclusive answer to any claim of priority in defendant in error based upon any settlement alleged by him at any time in respect of this land, namely, that the revocation of the withdrawal sought to be made by the Secretary of the Interior was a nullity, and therefore wholly void.

The granting act was a contract between the United States as grantor and the State and her designated beneficiaries

thereunder as grantees. By section 5 of the act quoted, *supra*, there was the express covenant between the parties to this contract that, on the filing of the map of definite location of the line of road by the Governor of the State with the Secretary of the Interior, "then it shall be the duty of the Secre" tary of the Interior to withdraw from market the lands" embraced within the provisions of this act." That duty was performed.

BUT THERE IS NOT, WITHIN THE FOUR CORNERS OF THE GRANTING ACT OF JULY 4, 1866, TO THE STATE OF MINNESOTA, ANY RESERVATION OF THE RIGHT TO ALTER, AMEND, OR REPEAL THAT ACT, OR ANY PART THEREOF.

Hence we say, and with emphasis, that the act of the Secretary of the Interior, in attempting to revoke the withdrawal made under this grant was without authority, and therefore wholly void. The State and her subordinate grantee had, at the time of such attempted revocation, and indeed as early as 1880, fully complied with all the conditions of the grant by construction of the entire line of road to aid which the grant was made. Now, it is settled, since the decision of this court in the Dartmouth College case, that a sovereign State is bound by its contracts and covenants precisely as the individual, in the absence of any express reserved power to alter or amend the same, and in the *Sinking Fund Cases* (99 U. S., 700, 719) that—

> "The United States are as much bound by their
> "contracts as are individuals. If they repudiate their
> "obligations, it is as much repudiation, with all the
> "wrong and reproach that term implies, as it would
> "be if the repudiator had been a State or a munic-
> "ipality or a citizen. No change can be made in
> "the title created by the grant of the lands, or in the
> "contract for the subsidy bonds, without the consent
> "of the corporation. All this is indisputable."

With the United States, as sovereign, thus bound, it is plain that no executive officer could perform any valid act

which would release that obligation, nor, as here, change, cloud, or defeat the title to the lands thus granted. It is true that section 4 of the act of September 29, 1890, which forfeited lands granted opposite then unconstructed railroads (26 Stats., ch. 1040, page 96), attempted to repeal section 5 of the granting act of July 4, 1866, but neither such repeal, nor the action of the Secretary in revoking this withdrawal under the assumed authority of the act of 1890, could, in legal effect, accomplish such plain breach of contract. In other words, it was a part *of the contract*, and of the covenants and promises embodied therein, that the lands embraced within the grant should be thus withdrawn and reserved from other appropriation and held to satisfy the particular grant which was the subject of the granting act. The road was completed and accepted; the United States has never sought in any form to forfeit the grant, and until the final adjustment of the grant, and the ascertainment of the amount of indemnity due thereunder, it was not within the power of Congress to defeat the withdrawal by repealing section 5 of the granting act, nor within the power of the Secretary of the Interior to revoke a withdrawal thus made, whereby adversary rights could be thereafter asserted against the grant, and to its plain impairment. This proposition is too sound in principle and too thoroughly engrafted in our jurisprudence to require extended discussion. We submit its mere statement upon the law and the facts of this record demonstrates that in no view can the title which the United States has made to us under this grant be successfully challenged by the defendant in error.

We submit the judgment below should be reversed.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Attorneys for Plaintiffs in Error.

APPENDIX.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *September* 11, 1894.

REGISTER AND RECEIVER,
Marshall, Minnesota.

SIRS: I have considered the appeals of the following-named parties from your action in rejecting their respective applications filed in November, 1891, for the lands hereinafter mentioned, because said lands had been selected by the Hastings and Dakota Railway Company under its grant on October 29, 1891.

The lands are within the twenty-mile indemnity limit common to the grants to the Hastings and Dakota and St. Paul, Minneapolis and Manitoba main line railway companies. They were applied for by the former company May, 1883, and selected by the latter on October 16, 1883.

By decision of October 23, 1891, the Department held that neither company had made legal selection or application for said lands, and held them subject to entry by the first legal applicant under the public land laws, or to selection by either company upon the presentation of legal application, superiority of right being determined by priority of initiation of claim (13 L. D., 440).

Under this decision the Minneapolis and Manitoba Company's selections of October 16, 1883, were canceled by Office letter "I" of November 12, 1891, and the Hastings and Dakota Company made selection of the lands October 29, 1891.

None of the applicants allege that the lands were settled upon either by themselves or others at the date of the said selections in October, 1891, by the Hastings and Dakota Company, nor do the records show that the lands were otherwise than vacant and subject to such selection at said date.

Under the circumstances your action in rejecting said applications was proper and is therefore approved.

You will so advise the respective applicants, allowing them the usual time for appeal.

Homestead applicants.	Land.		
Peter Fryseth.....	S. E. ¼, sec. 7,	T. 119 N.,	R. 40 W.
Ole K. Kvien.....	S. E. ¼, sec. 11,	"	"
Sam'l Collins.....	S. W. ¼, sec. 35,	120 "	"
Carl J. Olson.....	S. W. ¼, sec. 1,	122 "	44
Charles Hanson.	N. ½, N. W. ¼, sec. 11,	" "	"

The application of Carl J. Olson is denied for the additional reason that when presented the S. W. ¼ of sec. 1, Tp. 122 N., R. 44 W., was involved in the prior pending homestead application of Nels Johnson (1890-49745) and Christiana Johnson (1891-51887), and you will so advise him.

Very respectfully. S. W. LAMOREUX,
Commissioner.

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DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *January* 25, 1896.

Peter Fryseth *vs.* H. & D. Co.

HON. COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: I have considered the appeal of Peter Fryseth from the decision of your office of September 11, 1894, wherein you affirmed the decision of the local officers rejecting his homestead application presented December 2, 1891, for the S. E. ¼ of sec. 7, Tp. 119 N., R. 40 W., Marshall, Minnesota, land district, and finding no error in said decision, the same is hereby affirmed.

The papers transmitted by your office letter "F" of February 11, 1895, are herewith returned.

Very respectfully,

HOKE SMITH, *Secretary.*

SUPREME COURT OF THE UNITED STATES.

October Term, 1909.

No. 395.

EDWARD C. OSBORN and JOSEPH J. SLOCUM, Trustees of the Hastings and Dakota Railway Company, Plaintiffs in Error,

vs.

PETER PROVEETH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

Alton B. Brown,
Alexander Britton,
Ryan Brown,
Attorneys for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 395.

EDWARD C. OSBORN AND JOSEPH J. SLOCUM, TRUSTEES OF THE HASTINGS AND DAKOTA RAILWAY COMPANY, PLAINTIFFS IN ERROR,

vs.

PETER FROYSETH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

I.

The line of railroad was completed in 1880 (Finding 2, R., 58). The land here involved was originally selected by the Company on May 26, 1883 (R., 53). That selection was not adjudicated by the Secretary of the Interior until October 23, 1891, and the tract was again selected under the grant on October 29, 1891. Certainly no laches can be imputed to the Company in failing to promptly assert its rights.

II.

The Act of July 4, 1866, making the grant (14 Stats., 87) by section 5 provided that on filing of map designating the route of the road

> "then it shall be the duty of the Secretary of the In-
> "terior to withdraw from market *the lands embraced*
> "*within the provisions of this Act.*"

Beyond dispute, the lands within both the place and indemnity limits were "so embraced within the provisions of this Act," and the withdrawal pursuant to the direction of the statute was so made (Finding 6, R., 58).

And until the final certification of all available indemnity lands that withdrawal could not be lawfully revoked.

III.

Lands selected within indemnity limits could not of course be taxed by the State until the fee title had passed from the United States as held in *Wisconsin Central Ry. Co. v. Price County*, 133 U. S., 496, but that doctrine as expressed in that case and the rule that title does not vest in the grantee until approved selection, as held in the cases cited on opposing brief, does not cover the contention made by opposing counsel that such lands were subject to adverse appropriation when standing withdrawn therefrom under express command of statute. To rule otherwise is to render nugatory the statutory direction for such withdrawal with all its consequent legal effect. The withdrawal was made to protect the grant and to permit selection of the indemnity lands (as far as available) to satisfy losses within the primary or place limits and was plainly so intended.

IV.

The selection of October 29, 1891, was accepted and approved. As shown upon the main brief (pages 19-29), the claim of defendant in error was adjudicated by the Secretary of the Interior upon the facts presented by him. Defendant in error seeks review of such adjudication upon other and different facts *aliunde* the record made by him before the Land Department. We submit he is properly concluded by the facts presented by him before the Department and upon the record there made.

V.

The defense of the statute of limitations is not open—

1. Because not plead in this record, and not ruled in the State Court, and

2. Because the land was not conveyed by the Secretary of the Interior under this grant until June 18, 1900 (R., 39), and this suit was brought far within the limitation of fifteen years prescribed by the State statute of limitations quoted on pages 46 and 47 of opposing brief. Counsel contends throughout his entire brief that we did not take legal title until the land was conveyed to us—June 18, 1900. That title was necessary to sustain ejectment. Clearly, then, the State statute of limitations could not apply.

In construing the State law the Supreme Court of Minnesota, in *Washburn et al. v. Cutter*, 17 Minn., 361, held:

> "The weight of authority in our country settles
> " the principle, that the owner in fee of wild land has
> " the *constructive possession* thereof, unless there be
> " an adverse possession."

And construing the words "was seized or possessed of the "premises in question within fifteen years before the be- "ginning of the action," the Supreme Court of the State further holds:

> "The title of the owner of a freehold estate is de- "scribed by the terms 'seizure' or 'seizin in fee,' yet "in a proper legal sense, the holder of a legal title "is not seized until he is fully invested with the pos- "session, actual or constructive. Where there is no "adverse possession, the *title draws to it the pos-* "*session.*"
>
> *Seymour, Sabin & Co. v. Carli*, 31 Minn., 81.

The statute of limitations could not have been pleaded against the United States, nor could the conveyance from the United States to the Company operate to create against the latter the bar of the statute, when the pending suit was brought far within the limitation period.

VI.

The contention that the trustee under the Hastings and Dakota Company was without power to make selection of the tract in dispute on October 29, 1891, because of the prior dissolution of the Company in the suit brought by the State to forfeit its charter is plainly untenable. The right to make such selection was a property right, and vested long before such dissolution. The point was fully considered by the Secretary of the Interior and decision rendered June 19, 1894 (18 Land Decisions, 511). After recital of the facts the Secretary held (pages 517-519):

> "It is too well settled to be now seriously ques- "tioned that a judgment of forfeiture against a

"corporation reaches only its corporate franchises "and extinguishes them. The property rights are "not to be reached, and cannot be confiscated by the "State, but are to be protected and administered ac- "cording to the ordinary rules of equity (*Bacon v. "Robertson*, 18 How., 468, 473; Morawetz on Private "Corporations, sec. 1033).

"The effect of that dissolution is merely to de- "stroy the legal existence of the corporation, which "was the representative or trustee of the stockholders. "With dissolution is lost all remedy at *law*: the rights "of the stockholders, however, remain, though not "capable of being asserted in courts of law. The de- "cisions in England and this country are to the ef- "fect that there is a distinct and positive right of "property in the individuals composing the corpora- "tion, in its capital and business, even while subject "in the main to the management of the corpora- "tion. The dissolution of the corporation does not "destroy these rights; but a court of equity will in- "terfere effectively for their preservation (*Bacon v. "Robertson, supra; Meriwether v. Garrett*, 102 U. S., "472, 529; *Shields v. Ohio*, 92 U. S., 319, 324). "And to make this protection entirely effective, if "there be no trustee the court will not hesitate to "appoint one (2 Story's Eq. Juris., sec. 976, sec. "1059, *et seq.*).

"There can therefore be no force in the assertion "that the dissolution of the Hastings and Dakota "Railway Company destroyed any property rights "growing out of the business of that Company which "its stockholders were properly entitled to.

"That Company was organized for the purpose of "constructing, and was authorized to construct, a "railroad from Hastings, on the eastern boundary of "the State, to the western boundary thereof. The

"grant made by Congress to the State to aid in the
"construction of that road was conferred upon it by
"the State. The road has been built and operated
"for years. It was built with the money of the stock-
"holders. The grant having been fully earned by
"the construction, the stockholders are entitled, in
"good conscience, to the full benefit thereof, and
"their just claims, in that respect, should not be de-
"feated by technicalities or rigid construction. If
"the corporation had not been dissolved, there is no
"question but that, under the circumstances, it would
"have been entitled to select and receive under the
"grant indemnity for its lost lands. Can the stock-
"holders, surviving that dissolution, be deprived of
"that right which the corporation, as their agent,
"could have consummated? Clearly, on principle
"and authority, I think not.

"In the opinion of the court decreeing the dissolu-
"tion of the corporation, it is said that 'undoubtedly
"'the Company acquired an absolute right to the lands
"'actually earned as the construction of the road
"'progressed.' When the fact that the Company had
"earned the lands donated by the grant was estab-
"lished, coexistent therewith arose and attached the
"right to select indemnity for lands lost to the grant
"by the exceptions thereto (*Winona, etc., v. Barney*,
"113 U. S., 626). It is true that, while the title to
"the lands within the primary limits passed to the
"Company upon the definite location of the line of
"road, the title to the indemnity lands does not pass
"and is not vested in the beneficiary until a selection
"is made, and that selection is approved by the Secre-
"tary of the Interior (*Wisconsin v. Price*, 133 U. S.,
"496). But the vesting of the title to particular
"lands is entirely different from the right to initiate
"proceedings which will ultimately ripen, by ap-

"proval, into a perfect and complete title. This
"'right to select' is recognized in the Kansas Pacific
"case, 112 U. S., 421, and other decisions of that
"court, as well as in many decisions of this Depart-
"ment; and in the Cedar Rapids case, 110 U. S., 39,
"it is said that this 'right' accrues when the map of
"the entire line is filed; that is, the lands in place
"being then capable of identification, and the lost
"lands ascertainable, coincidently therewith the
"'right' to select arises and becomes fixed in the
"grantee company, though the title to the selected
"lands does not vest until after approval, if there be
"any to select.

"Unquestionably it is a 'right' and a valuable prop-
"erty right, such a right as might be sold or encum-
"bered (*Myers v. Croft*, 13 Wall., 291) as has been
"frequently done by grantee companies, and would
"entitle the assignees to the indemnity lands when
"title thereto is perfected under the grant, in accord-
"ance with its directions. Such a right is, to my mind,
"as a *chose in action*, part of the assets of the corpo-
"ration in question, and would be administered by a
"court of equity in the interest of the creditors and
"stockholders, the court appointing a trustee, if
"necessary, to secure possession and control of those
"assets.

"In this instance a trustee has been appointed for
"the very purpose so that there is no necessity for
"the action of a court in that respect.

"It is said, however, that the appointment of this
"trustee was *ultra vires;* that there was no authority
"of law for his appointment in the way in which it
"was made.

"This position, I do not think, is tenable. The
"appointment was made during the three years al-
"lowed the corporation within which to wind up its

" affairs. It had full power during that time to dis-
" pose of its property by deed of bargain and sale;
" and surely if it then had the power to sell absolutely
" the assets for the benefit of the creditors and stock-
" holders, it would seem to be paradoxical to hold
" that the Company was powerless to execute a deed
" conveying a lesser estate, an estate limited by a
" trust, to consummate the very purpose for which
" the company's existence was prolonged. It cer-
" tainly cannot be, if all the assets are not collectable
" and distributable within the three years, that it was
" contemplated nothing thereafter was to be done to
" attain that end. Such a view leads to practical
" confiscation, which is abhorrent to our sense of
" justice. In the nature of things many of these
" assets could not be realized within the time named,
" and if no one could be empowered after that time to
" collect and distribute them, innocent creditors and
" stockholders would be deprived of their rights of
" property, without 'due process of law'; a premium
" and immunity would be offered as inducements to
" the debtors and others to avail themselves of devices
" to delay payments to the Company beyond the three
" years.

"The execution of the deed in question by no
" means extended or attempted to extend the life of
" the corporation, or sought in any way to carry on
" the business of the Company. On the contrary, its
" purpose was to close up the affairs of the Company,
" to collect and dispose of its assets, and settle finally
" the claims of creditors and stockholders. The au-
" thority to execute such a deed clearly existed in the
" corporation at the time of the execution, and it is
" no way unreasonable to hold that the power con-
" veyed survived the existence of the Company."

This conclusion was also affirmed in *Hanan v. Sage*, 58 Fed. Rep., 651, and reaffirmed by the Secretary of the Interior October 11, 1895 (21 Land Decisions, 312). Lands enuring under the grant have been conveyed accordingly. That such conclusions are in accord with the long-settled law is too manifest to require further discussion.

As to the jurisdiction of Ramsey County District Court to appoint substitute trustees (page 47 of opposing brief) the Statutes of Minnesota, 1905, section 3263, provide:

> "Upon the death of the surviving trustee of an ex-
> "press trust, * * * the trust, if then unexe-
> "cuted, shall vest in the district court, with all the
> "powers and duties of the original trustees and shall
> "be executed by some person appointed for that pur-
> "pose, under the direction of the court."
>
> "The district courts shall have original jurisdic-
> "tion * * * in all special proceedings not ex-
> "clusively cognizable by some other court or tribunal,
> "and in all other cases wherein such jurisdiction is
> "especially conferred upon them by law." *Id.*, section 90.
>
> "In a sense, the several district courts constitute
> "one court of general jurisdiction co-extensive with
> "the boundaries of the State. This one general court
> "is divided into districts as a matter of convenience.
> "So far as jurisdiction over the subject-matter is con-
> "cerned the several district courts stand upon perfect
> "equality." *Dunnell's Minnesota Practice*, section 1

The district court of any county has jurisdiction of the subject-matter of real property anywhere in the State though outside of its particular county. *Smith v. Barr*, 76 Minn. 513.

The only limitation of this general jurisdiction was made

in 1885, when what is now section 4089 of the Statutes of 1905 was enacted.

> "*Actions* for (1) the *recovery* of real estate, (2) "the *foreclosure* of a mortgage or other lien thereon, "(3) the *partition* thereof, (4) the *determination* in "any forum of an estate or interest therein, and (5) "for *injuries* to lands within this State, shall be tried "in the county where such real estate or some part "thereof is situate. * * * If the county desig- "nated in the complaint is not the proper county, the "court therein shall have no jurisdiction of the "action."

This has no application. In the *first* place a special proceeding to have trustees named is not an "action." "There "shall be in this State but *one form of action* * * * "called a civil action, and the party complaining shall be "styled the *plaintiff* and the adverse party the *defendant*." Statutes 1905, section 4052. In the *second* place, even if the proceeding were an "action," its purpose was none of the above specified. Moreover, the objection was raised in the trial court, was overruled, and no exception taken (R., 57).

ALDIS B. BROWNE,
ALEXANDER BRITTON,
EVANS BROWNE,
Attorneys for Plaintiffs in Error.

FILED.
JAN 3 1910
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 395.

EDWARD C. OSBORN and
JOSEPH J. SLOCUM, as Trustees
of the Hastings & Dakota
Railway Company,

Plaintiffs in Error,

vs.

PETER FROYSETH,

Defendant in Error.

In Error to the Supreme Court of the State of Minnesota.

BRIEF FOR DEFENDANT IN ERROR.

C. A. FOSNES,
Attorney for Defendant in Error.

Supreme Court of the United States.

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Defendant in Error.

In Error to the Supreme Court of the State of Minnesota.

BRIEF FOR DEFENDANT IN ERROR.

The defendant in error claims:

1. That the Hastings & Dakota Railway Company acquired no rights under the selection of 1883.

2. That land being within the indemnity limits of the grant, the company acquired no rights until the deficiency in the place lands was ascertained, a selection made and APPROVED by the SECRETARY OF INTERIOR.

3. The lands having been restored to the public domain on October 23rd, 1891, the respondent's rights as a homesteader attached at that time.

4. That the respondent had at least three months from October 23rd, in which to make application for homestead entry.

5. That at the time of the attempted selection of Sage on October 29th, 1891, defendant's rights had attached by reason of his settlement and improvement and that such settlement prevented a selection by the company or its representatives.

6. The railway company having ceased to exist on March 23, 1900, three years after the entry of the forfeiture judgment, had no right through its trustees or otherwise to select any lands.

7. Plaintiff has had no possession within 15 years next before the commencement of this action, hence cannot maintain ejectment.

The attempted selection of May 26, 1883, and on which so much stress is laid by plaintiff in error, was refused for the following reasons:

First: There is nothing to show that the Hastings & Dakota Railway Company are entitled to the lands.

Second: These lands are within the limits of the grant to the St. P., M. & M. Ry. Co., and withdrawn for the benefit of that grant.

(R. Page 53.)

The selection of the lands here involved by the St. P., M. & M. Ry. Co. in 1883, is no longer important, as the claim of that company was never sought to be revived after the adverse decision thereon herein referred to. On Oct. 23rd, 1891, the Hastings & Dakota Railway Co's selection came before the Secretary (13 L. D. 440) and he said:

In the circular of November 7th, 1879, to Registers and Receivers relative to the adjustment of land grants, under the head of INDEMNITY SELECTIONS OF RAILROADS, is the following:

"In the adjustment of all grants it consequently becomes necessary to know for what lands lost in place, the indemnity selections are made, and with a view to that end you will require the companies to designate the specific tracts for which the lands selected are claimed.

THESE INSTRUCTIONS HAVE NEVER BEEN REVOKED, and were consequently in force at the dates of the several selections made by these companies."

He further said:

"The selection of May 26th, 1883, by the Hastings & Dakota Company, was unaccompanied by a designation of losses, and should have been rejected for this reason."

After declaring the St. P. M. & M. selections invalid for the same reason, and the additional reason that these lands could not be selected by that company for losses along its St. Vincent branch, he further says:

"The orders of withdrawal of indemnity lands for these companies having been revoked (12 L. D. 54) and there being no valid selection of the lands by either company, you will hold the same subject to entry by the first legal applicant; or to selection by the first company presenting application therefor in the manner prescribed by the regulations governing such selections."

This decision by the secretary that there was no designation of losses made as a part of this application to select, was a decision upon a question of fact, and under the familiar rule was not open to inquiry in this case.

The Court's attention is called by counsel for plaintiff in error to the case of Railroad Co. vs. Barney (117 U. S. 228) and quotation made from it as sustaining their contention that specific designation of losses in making indemnity selection was not necessary. We do not regard that case as authority in point. We do not agree

with counsel in their statement on page 17 that when the line of definite location was filed and accepted on June 26th, 1867, it THEN appeared that the grant was deficient over 900,000 acres and it THEN appeared that there was only about 100,000 acres available indemnity lands. If we understand the facts correctly, this did not appear until several years afterwards. The contention is not well founded because irrespective of the fact that there was not sufficient indemnity land to supply the deficiency in place limits. This rule was necessary to an intelligent administration of the land department. Without it the secretary could not understandingly perform, as to indemnity selections, the duties which devolve upon him, and which are so clearly and categorically stated by this Court in the case of W. C. Ry. Co. vs. Price County, 133 U. S. 496. In the decision of Secretary Noble, cancelling the selections involved here, he said:

"THESE INSTRUCTIONS HAVE NEVER BEEN REVOKED, and were consequently in force at the dates of the several selections made by these companies."

By the language of the several acts making these railroad grants the Secretary of the Interior was clothed with exclusive supervisory power over selections of indemnity lands, and if there is any one thing more perfectly plain than any-

thing else in reference to the matter, it is that the only way in which he could exercise that supervision, was to prescribe definite rules to be followed by the companies seeking to obtain the land. This rule with the others required the company to furnish the department with such information as to enable it to determine whether the party applying for the selection was entitled to the land, so that the secretary could intelligently exercise his JUDICIAL function, in either approving or disapproving the selection.

Whatever therefore was the reason which first suggested the adoption of this rule, the rule itself proved salutary, if not indispensible, and was retained, and is still in force; and I do not see how a court could say that the rule is either unreasonable or oppressive, or that it ought not to be observed. The officers of the interior department, always eminent lawyers, no doubt were aware immediately upon its rendition, of the decision overruling 2 Otto 733, but did not find in that fact, any reason why this valuable and necessary rule should be revoked.

If this rule had been regarded as obsolete by the interior department, Secretary Teller would not have deemed it necessary to issue an order on May 28th, 1883, suspending its operation as to the Northern Pacific grant (12 L. D. 196). In that order, the secretary, after referring to the

fact that the unparalleled demand for land by actual settlers, made it highly necessary to hasten the adjustment of that grant, said:

"In order to facilitate the work of making selections, I think you should instruct the local officers that, when clear lists of selections, free from conflict or other objection, are filed with the district officers and approved by them, said selections should at once be marked upon their books, and forwarded for final examination, leaving the ascertainment of lands lost in place to our office, instead of requiring preliminary lists of lost lands, together with the indemnity lands, tract for tract, from the company as heretofore."

In the case of LaBar v. Northern Pacific Ry. Co., 17 L. D. 406, decided October 14th, 1893, the secretary says as to this rule:

"Since the circular of November 7th, 1879, however, it has been uniformly required that the losses be specified, except in the case of the Northern Pacific grant, which was excepted from the requirement by departmental order of May, 28th, 1883, under the belief that such course would aid a speedy adjustment and secure an early restoration of those lands not needed."

The suspension of this rule above referred to as to the Northern Pacific grant is one of the chief reasons no doubt which controlled the decision by this court of the case of St. Paul & Pa-

cific vs. Northern Pacific 139 U. S. 1, referred to in counsel's brief on page 17.

But this decision has lost much of its force, if it has not been entirely overruled by the case of Sjoli vs. Dreschel.

199 U. S. 561.

to which more particular attention is called later.

The supreme Court of Montana, in Elling v. Thexton, 16 Pac., 931 (35) discussing the necessity for this rule, says:

"It is to be borne in mind that the right to make the selection depends upon the loss; that if there were no losses there could be no lieu lands; that the selection was to be made under the direction of the Secretary of the Interior." *** "The act of congress granting the right to make selections only after the lands were lost, or upon condition that they were lost, is higher than any order or direction of the Secretary of the Interior; and any order or direction made by that officer in contravention of the statute is void, and no right can arise under it."

"We are asked by the appellants to take judicial notice of the great losses which the railroad company must have sustained by reason of Indian reservations, and of the settlements which were made within the limits of the grant prior to the final location of its line, and from this to assume that the selections under consideration were in

lieu of losses thus sustained. We cannot do this. This is a matter for the executive department of the government. It is a part of the duty of the Secretary of the Interior; and before the railroad company, or those holding under it, can come and ask possession of a tract of land, they must be able to deraign a title, and it is upon it to show that the selection was made of the particular tract of land in controversy for a loss which it had sustained; that in the adjustment of the losses of the land office in Washington, this particular tract had been allowed as lieu land, so as to give it a title. This they have not done. They have but shown a simple preliminary step toward title; but for want of the approval of the Secretary of the Interior, or of a showing by some authority that the land selected was in lieu of some particular land lost, they have not shown any title."

The Supreme Court of the State of Minnesota is disposing of this point in Sage vs. Maxwell 91 Minn. 527, quoting from page 523 lay down the following rule. "The plaintiff, however, claims that the rule is not applicable to this case, because all of the land in the indemnity belt was insufficient to make up the losses of place lands. Referring to the case of Oregon and C. R. Co. v. U. S. 189 U. S. 103, that court says that that question is answered by that case and from the opinion therein quote the following: "It

is also said that all the lands within the indemnity limits were required to supply the deficit in the place limits arising from the disposition prior to definite location by sale and otherwise of lands within the granted limits. But the extent to which lieu lands could be required to supply such deficit in place lands could not be properly or legally determined until there was an adjustment of the grant in respect of place limits. In any event, no such adjustment having taken place prior to the date of the settler's bonifide occupancy, his rights arising from that occupancy would not be affected by the fact, subsequently appearing in whatever way, that all the odd-numbered sections in the indemnity limits were needed to supply deficiencies in the place limits." There was no adjustment of the grant in this case until July 22, 1890. This is also an answer to the claim that it was not necessary for the company, in its attempted selection of May 26, 1883, to comply with the rules of the Land Department as to furnishing a list of place lands lost."

Neither will it avail appellant to contend that in this case the rule should not apply, because the deficit in the place limits exceeded the whole amount of the remaining indemnity lands. As shown by the foregoing cases, that condition exists in a multitude of grants, and it has been held over and over again that such a condition in no

manner affects the rights of the parties. As no right to indemnity land can be initiated without a selection, and as a selection within the meaning of the law is not made till it is approved by the secretary, no condition of either surplus or deficit affects the matter. All the cases agree that the title to indemnity land, when secured takes effect by relation, not from the date of the grant, BUT FROM THE DATE OF SELECTION AND APPROVAL. The selection and approval therefore is the actual initiation of the claim, and not the grant. Besides, the Supreme Court has said that there is no way to get the information as to a deficit or excess in a grant until the official adjustment.

To contend therefore that in 1883, when this selection was attempted, the local officers could from hearsay or the statements of the company officially assume that there was a shortage in place lands exceeding the whole amount of the indemnity lands is untenable.

I confidently claim that the above authorities fully sustain my contention on this branch of the case:

1. That a railway company can acquire no right in indemnity land without a valid selection thereof, approved by the Secretary of the Interior; and the existence of a greater deficit in respect of place lands that can be supplied by the

indemnity lands, does not obviate the necessity for a selection and an approval thereof.

2. That the attempted selection by the Hastings & Dakota Company on May 26th, 1883, was radically defective because of the failure to furnish a list of lost lands, and was properly rejected for this reason, and as found by the learned trial court in his decision, THE COMPANY ACQUIRED NO RIGHT WHATEVER UNDER SAID SELECTION OF 1883.

The Hastings & Dakota Railway Company was a party to the proceedings in which its 1883 selection was declared void and should under the rules be bound by that decision.

The question naturally arises what right, if any, is required in indemnity land without an approval of the selection.

I also feel constrained to call the court's attention to the implication carried through the argument of the plaintiff, that by reason of the language of this grant, the fixed rules of law which have been applied in determining the rights of parties in a multitude of similar grants, ought not to apply.

In some of the grants that have been made to states, it is provided that the SELECTION of the indemnity lands, shall be made by an agent of the State, and in others that the selection shall be made by the company, but in all cases subject

in some manner to the approval of the Secretary of the Interior. Other grants provide that the selection of indemnity lands shall be made "under the direction" of the Secretary, while in this the language used is that the Secretary "shall cause to be selected" the indemnity land. The one controlling feature in all the grants is that the selection of indemnity land must be made with acquiescence and approval of the Secretary. Whatever form of words has been used, the essence is the same, and all these grants, in this respect, have been construed alike by the land department and the courts without any hair-splitting distinctions, and without speculating on the different shades of meaning which could be ascribed to the language used.

In Wis. C. Ry. Co. v. Price, 133 U. S. 496, the Court says:

"Numerous grants of land were made by Congress between 1860 and 1880 to aid in the construction of railroads; some directly to incorporated companies, others to different states, the lands to be by them transferred to companies by whom the construction of the road might be undertaken. The different acts making these grants WERE SIMILAR IN THEIR GENERAL PROVISIONS, and so many of them have been at different times before this court for consideration, that little can be said of their purport and mean-

ing, the title they transfer, and the conditions upon which the lands could be used and disposed of, which has not already and repeatedly been said in its decisions. Each grant gave a specified quantity of lands, designated by sections along the route of the proposed road, with the exception of such as might, when the line of road should be definitely fixed, have been disposed of or reserved by the government, or to which a preemption or homestead right might then have attached. For these excepted sections — which otherwise would have been taken from those designated along the line of the roads, other lands beyond those sections, within a specified distance were allowed to be selected (as indemnity)."

Again in Barney v. Winona & St. P. Ry Co., 117 U. S. 228, the court says:

"In the construction of land grant acts in aid of railroads, there is a well established distinction observed between 'granted lands' and 'indemnity lands.' The former are those falling within limits specially designated and the title to which attaches when the lands are located by an approved and accepted survey of the line of the road filed in the land department, as of the date of the act of congress. The latter are those lands selected in lieu of parcels lost by previous disposition or reservation for other purposes, and

the title to which accrues only from the time of their seletion."

This grant, like all others of its kind, contained "granted lands" and "indemnity lands." The title to the granted lands attached when the line of road was definitely located by the filing of a proper map in the land office, subject to the condition subsequent that the road must be constructed—but the title to the indemnity lands would not accrue until there was a SELECTION, and an approval thereof. There is no one designated in this act to make the selection, and it would therefore have to be made by the party interested in getting the lands. No other selection is claimed, except that made by the company.

Counsel seem to claim that this company was the victim of some violation of duty on the part of the Secretary of the Interior because by the terms of the act it was declared to be his duty "to cause to be selected" within the indemnity limits, the land to which the company might be entitled. This language is not peculiar to this grant; it is the identical language used in the grant of March 3, 1863, to the State of Kansas, which was construed in Kan. P. R. Co. v. Atchison T. & S. R. Co., 112 U. S. 414.

It is also identical with the language used in the grant (13 Stats. 84) construed by the court in S. C. & St. P. R. Co. v. C., M. & St. P. Ry.

Co., 117 U. S. 406; and with the language of the grant considered in U. S. vs. Missouri, K. & T. Co. 141 U. S. 358.

These are three of the most conspicuous cases in which it was held that before any rights could be acquired in indemnity land under such a grant, a SELECTION must be made by the company, which, in order to be efficacious, must be approved by the Secretary.

The same was held as to a grant where it was provided that the land to be taken by the company as indemnity should be "indicated" by the Secretary. The Court held that the word INDICATED, while peculiar, meant no more than that the selections were to be approved by him.

St. P. & S. C. Ry. Co. v. W. & St. P. Ry. Co , 112 U. S. 720.

The same rule has been applied to grants where the act required the indemnity lands to be selected "under the direction" of the Secretary of the Interior.

Railway Company v. Bell, 183 U S. 675.

It is clear, therefore, that there is nothing about this grant which requires the application to it of any different rules from those which apply to all grants of its kind.

It is clear without argument that the act of the Land Department in simply withdrawing the land from settlement, within an indemnity grant,

whether by direction of the granting act or not, creates no RIGHT in the land. It is simply a step by which the land affected is withheld from the public for a sufficient time to give the company for whose benefit it is contingently granted an opportunity to make its selections.

This grant directed the land to be withdrawn, and it was accordingly done.

But no proposition is better established than that the Secretary of the Interior has the power, VIRTUTE OFFICII, to make withdrawals of the public lands and the power to MAKE, carries with it the power to revoke withdrawals at his will, when no statute is in the way.

Wolsey v. Chapman, 101 U. S. 755.

O'Connor v. Gjertgens, 85 Minn. 483.

The exercise of this power is discretionary, where the grant is silent on the subject. In this instance congress expressly directed the withdrawal to be made, and converted the discretionary power into a positive duty. In like manner by the act of Sept. 29th, 1890, when congress desired to invest the Secretary with the discretionary power to revoke the withdrawal at his will, it repealed the section which had required him to make it. By neither act did congress enlarge or diminish the general powers theretofore possessed by the Secretary.

Speaking of rights under withdrawals and

the abuses arising from unnecessarily prolonging them in Railway Company v. Railway Co., 112 U. S. 720, the Court says:

"It is true that in some cases the statute requires the land department to withdraw the lands within these secondary limits from the market, and in some others the officers do so voluntarily. This, however, is to give the company a reasonable time to ascertain its deficiencies and make its selections; it by no means implies a vested right in the company.

The Court further says in that case:

"The court of original jurisdiction finds that up to the time of the trial in October, 1878, a period of nearly twenty years; no selection of these lands had ever been made by the company, or any one for it. Was there a VESTED RIGET in this company, during all this time, to have, not only these lands but all the other odd sections within the twenty mile limits on each side of the line of road, await its pleasure? Had the settlers in that populous region no right to buy of the government because the company might choose to take them, or might after all this delay, find out that they were unnecessary to make up deficiencies in other quarters? How long were such lands to be withheld from market, and withdrawn from taxation, and forbidden to cultivation?

In Ry. Co. v. Bell, 183 U. S. 675, the Court says:

"In view of the constant trend of population toward the western territories it is a serious matter to withdraw these enormous tracts from settlement and hold them as it were in mortmain, against the protest of those who stand ready to enter upon and possess them. It becomes still more serious when as in this case there was a delay of twenty-seven years between the granting act and the act of selection. It seems intolerable that a settler, who had entered and paid for lands in good faith, should be liable to an ouster after a possible lapse of twenty-seven years, when the very improvements he may have put upon the land might be the reason for their selection by the company.

After the repeal of the section of the law requiring this withdrawal to be made, and after 23 YEARS had been allowed the company in which to make its selections, the secretary on May 22, 1891, directed its revocation. The Secretary in his letter calls attention to the fact that the obstacle in the way of the REVOCATION of this as well as a similar withdrawal in relation to the Manitoba grant, had now been removed by the repeal of the sections of the laws requiring them to be made.

Under those circumstances no doubt can be

entertaned of either the right or propriety of the repeal by congress of that part of the act directing the withdrawal to be made, and the CONSEQUENT revocation of the withdrawal by the land department.

In the letter of the commissioner to the local officers on the subject he said:

"You are directed to restore to the public domain and open to settlement and entry all lands heretofore withdrawn in your district within the indemnity limits of the grant for the Hastings & Dakota Railroad Company and not embraced in selections heretofore made or applied for by said company."

This limitation, though not expressly authorized by the secretary probably suspended the restoration of the lands covered by the selections which had been "applied for" on May 26th, 1883, by the company, UNTIL SAID SELECTIONS WERE DISPOSED OF. But it cannot be argued with any seriousness or show of reason, that the revocation of the withdrawal and the restoration of the land to the public domain was not complete on Oct. 23rd, 1891, when the selections of the railway company which had been attempted, or "applied for" were cancelled and wiped out.

From that time, at least, until Froyseth attempted to file there was nothing on record ad-

verse to the rights or claim of the homestead occupant, his rights immediately attached.

S. P. Ry. Co. v. Bell, 183 U. S. 675.

We now come to the important question under this subdivision of our argument, viz: WHAT RIGHTS HAS A LAND GRANT RAILROAD COMPANY IN THE LANDS IN THE INDEMNITY LIMITS OF ITS GRANT, PRIOR TO SELECTION; AND WHAT CONSTITUTES A SELECTION?

"I firmly contend that NO VESTED RIGHT CAN BE ACQUIRED IN INDEMNITY LANDS, in a grant like this, until there is a valid SELECTION which is APPROVED BY THE SECRETARY OF THE INTERIOR, REGARDLESS OF THE DEFICIT OF THE PLACE LIMITS.

If a selection is necessary, it seems self evident that it must be APPROVED or REJECTED by somebody. A selection of lands by a railway company which did not require favorable consideration by some officer on behalf of the government before it became effective would be an act too trifling and useless to be required. A selection of indemnity lands is not essentially different from a filing by a settler, and like a filing it must be presented to some one as the assertion or proffered initiation of RIGHT and the proper officer on behalf of the government must decide whether or not it shall be allowed. By some form of expression in all of the land grant acts, the Secretary

of the Interior, who is at the head of the land department, is designated as the officer whose assent must be secured. The rules and practice of the land department, and the decisions of the courts have reduced these various provisions for securing the assent of the Secretary to the uniform requirement, that he must "approve" all selections before they become effective.

One of the best considered cases on this subject, in which many former decisions to the same effect are referred to, is that of Wis. Cent. Ry. Co. v. Price County, 133 U. S. 496, wherein the court, speaking of the INDEMNITY land of the grant, says:

"For such land no title could pass to the company, not only until selections were made by the agents of the State, but until such selections were APPROVED by the Secretary of the Interior. * * * The approval of the secretary was essential to the efficacy of the selections, and to give to the company ANY TITLE to the lands selected. His action in that matter was not ministerial, BUT JUDICIAL. He was required to determine in the first place whether there were any deficiencies in the land granted to the company, which were to be supplied from indemnity lands; and in the second place whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach

a proper conclusion on these two questions he had also to inquire and determine whether any lands in the place limits had previously been disposed of by the government, or whether any pre-emption or homestead rights had attached before the line of the road had become definitely fixed. THERE COULD BE NO INDEMNITY UNLESS A LOSS WAS ESTABLISHED.

And in determining whether a particular selection could be taken as indemnity for the loss sustained, he was obliged to inquire into the condition of those indemnity lands and determine whether or not any portion of them had been appropriated for any other purpose, and if so, what portion had been thus appropriated, and what portion still remained. This action of the SECRETARY was required not merely as supervisory of the acts of the agents of the state, but for the protection of the United States against an improper appropriation of their land. UNTIL THE SELECTIONS WERE APPROVED THERE WERE NO SELECTIONS IN FACT, ONLY PRELIMINARY PROCEEDINGS TAKEN FOR THE PURPOSE; AND THE INDEMNITY LANDS REMAINED UNAFFECTED IN THEIR TITLE. Until then the lands which might be taken for indemnity were incapable of identification; the proposed selections remained the property of the United States.

"The government was indeed under a prom-

ise to give the company indemnity lands, in lieu of what might be lost by the causes mentioned. BUT SUCH PROMISE PASSED NO TITLE, AND UNTIL IT WAS EXECUTED CREATED NO LEGAL INTEREST WHICH COULD BE ENFORCED IN THE COURTS. The doctrine that until selection is made, no title vests in ANY INDEMNITY LANDS has been recognized in several decisions of this court."

The explicit doctrine so clearly stated in the above case, has been uniformly adhered to by this court ever since.

The case of St. P. & C. Ry. Co. v. N. P. Ry. Co., 139 U. S. 1, upon which counsel for plaintiff lay much stress, would at first glance seem to be at variance with this rule. It was there laid down that in a contest between two railway companies, where their indemnity grants overlapped, no selection was necessary in order to give priority to the one having the older grant, where it also appeared that the shortage in the place limits exceeded the amount of land in the indemnity limits.

But the fact that that decision was not intended as a modification of the general rule, is shown by the case of U. S. v. Mis. K. & T. Co., 141 U. S. 358, decided six months later, wherein as in this case, lands that would otherwise be

a part of the public domain are sought to be taken for indemnity; the Court says:

"As to lands which may legally be taken for purposes of indemnity the principle is FIRMLY ESTABLISHED that title to them DOES NOT VEST IN THE RAILROAD COMPANY, for the benefit of which they are contingently granted, but in the fullest legal sense remains in the United States, until they are actually selected and set apart, UNDER THE DIRECTION OF THE SECRETARY OF THE INTERIOR, specifically for indemnity purposes."

The Court then quotes from a former opinion on the subject as follows:

"No title to indemnity lands were vested until a selection was made, by which they pointed out and ascertained, and the selection made APPROVED BY THE SECRETARY OF THE INTERIOR."

After citing with approval the case of Railway Co. v. Price Co. supra, the court says:

"As to the exception to this rule noticed in St. P. Ry. Co. v. N. P. Ry. Co., 139 U. S. 1, it is sufficient to say that it has no application to the facts in this case."

Again a few months later in the case of U. S. v. Colton M. & L. Co., 146 U. S. 615, an action involving the right to indemnity land in a grant where the shortage in the place limits exceeded the total indemnity lands available, the

court said:

"The ordinary rule with respect to indemnity lands is that no title passes until selection. Where as here the deficiency within the granted limits is so great that all the indemnity lands will not suffice to make good the loss, it has been held, IN A CONTEST BETWEEN TWO RAILWAY COMPANIES that no formal selection was necessary to give them to the one having the elder grant, as against the other company, St. P. Ry. Co. v. N. P. Ry., 139 U. S. 1."

The same view was taken and understanding of that case entertained by the Supreme Court of California. In its opinion in the case of Railway Co. v. Woods, 124 Cal. 475, which involved the question as to when title to indemnity land vested when there is insufficient land in the grant to make up the losses. The Court said:

"It is said by counsel for appellant that, where all the undisposed of odd sections within the exterior limits of the grant are insufficient to make up the quantity granted, there need be no selection; and by definite location the grantee perfects the same title to the lands within the indemnity limits as to those in the primary limits, citing St. Paul & P. R. Co. v. N. P. R. Co., 139 U. S. 1 (19).

"As to the first part of this statement the case cited held that, as all the lands within the

indemnity limits only made up in part for the deficiencies, there was no occasion for the exercise of the judgment of the Secretary in selecting from them, for they were all appropriated. The controversy there was as to the rights of two different railroad companies, claiming under different grants the same indemnity lands, and not as to the right of either company to a specific parcel, as against a claimant under the homestead or pre-emption laws, and therefore it was only necessary to determine whether all the odd sections within the indemnity limits were required to indemnify the company having the prior right for its losses within the place limits, these lands having been withdrawn by the land department for the benefit of the Northern Pacific Company; and the language used by the court must be read in the light of these facts."

The case in the 139 U. S. was still further distinguished by the court which promulgated it, in the case of Southern Pacific Ry. Co. v. Bell, 183 U. S. 675. This was a grant where the deficit in place lands exceeded all the lands in the indemnity limits.

After considering the question in all its phases the court again per-emptorily laid down the rule in this language:

"The conclusions to be deduced from these cases are:

(1) That as to lands within the primary limits, the grant takes immediate effect, and attaches to particular lands when the map of definite location is filed; that the secretary of the interior may upon the filing of such map give notice of a withdrawal from sale of all the odd-numbered sections within the primary limits, and that the title so acquired by the railroad company relates back to the date of the grant, and takes precedence of all titles subsequently acquired, except those specifically named.

(2) That as to lands within the indemnity limits, the company takes no title until a deficiency in the place limits has been ascertained, and the company has exercised it's right of selection, WITH PERHAPS SOME RARE EXCEPTION.

The understanding of the Interior Department as to the meaning and limitations of said decision in 139 U. S. was the same as that of the courts which have subsequently referred to it, as shown by the decision of Secretary Smith in N. P. R. Co. v. Davidson, 16 L. D. 457, where the secretary says:

"The company urge, under the authority of decision of the Supreme Court in the case of St. P. & P. Ry. Co. v. N. P. Ry. Co., (139 U. S. 1). That the lands being free from claim at the date of the definite location of the road, no selection was necessary to attach a right under the grant,

THERE NOT BEING SUFFICIENT LANDS WITHIN THE INDEMNITY LIMITS TO SATISFY THE GRANT FOR LOSSES SUSTAINED WITHIN THE PRIMARY limits. A similar contention was made in the case of said company against Petit (14 L. D. 591) but in that case it was held that said decision is not authority for holding, that title can be acquired for indemnity lands prior to the selection thereof. In the case of S. P. R. R. Co. vs. McWharton (14 L. D. 610) a similiar question was considered, and it was held that the fact that a deficit exists in the grant does not relieve the company from the necessity of the selection, to acquire title to indemnity lands."

Another case which I want to call particular attention to is

ARD vs. BRANDEN, 156, U. S. 537.

After reviewing the facts which are no stronger than in the present case, the Court says:

"He had a right to enter the land as a homestead; he pursued the course of procedure prescribed by the statute; he made out a formal application of entry, and tendered the requisite fees, and the application and fees were rejected by the officer charged with the duty of receiving them, and wrongfully rejected by them. Such wrongful rejection did not operate to deprive defendant of his equitable rights, nor did he forfeit or lose

those rights because, after this wrongful rejection, he followed the advice of the Register and sought in another way to acquire title to the lands. The law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon. If he does all that the statute prescribes as the condition of acquiring rights, the law protects him in those rights, and does not make their continued existence depend alone upon the question whether or no he takes an appeal from an adversed decision of the officers charged with the duty of acting upon his application.

"The policy of the Federal government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements over that of any other person."

There can be no question as to the good faith of the defendant. He went upon the land with the view of making it his home. He has occupied it ever since. He did all that was in his power in the first instance to secure the land as his homestead. That he failed was not his fault; it came through the wrongful action of one of the officers of the government. We do not mean to hold that the government or its grantees are concluded by the mere fact that one of its officers

has given eroneous advice. If there was nothing more in this case than that the defendant consulted the officers of the land office as to how he could best obtain title to the land, that they gave him advice which was founded upon a mistake of fact and was not good advice, that he pursued the plan they suggested, and yet failed to acquire the title, he would have to beat the consequence of the error. But here a rightful application was wrongfully rejected. This was not a matter of advice, but of decision. Doubtless the error could have been corrected by an appeal, and perhaps that would have been the better way; but when, instead of pursuing that remedy, he is pursuaded by the local land officer that he can accomplish that which he desires in another way—a way that to him seems simpler and easier—it would be putting too much of vigor and technicality into a remedial and beneficial statute like the homestead law to hold that the equitable rights which he had acquired by his application were absolutely lost."

One ot the latest cases decided by this court involving the same question and apparently on all fours with the present one is

Sjoli vs. Dreschel, 199 U. S. 561.

In the case the court says:

"That no rights to lands within indemnity limits will attach in favor of the railroad com-

pany until after selections made by it with the approval of the Secretary of the Interior.

That up to the time such approval is given, lands within indemnity limits, although embraced by the company's list of selections, are subject to be disposed of by the United States; or to be settled upon and occupied under the pre-emption and homestead laws of the United States; and

That the Secretary of the Interior has no authority to withdraw from sale or settlement lands that are within indemity limits which have not been previously selected with his approval to supply deficiencies within the place limits of the company's road. * * * Now, it is stipulated in this case, that the Secretary of Interior has never approved the selection by the railroad company of the land here in question to supply deficiencies in place limits. So that, when Sjoli settled upon the land, it was, so far as the railroad company was concerned, part of the unappropriated public lands open to settlement under the homestead laws. The railroad company had no direct legal interest in it. The company's unapproved selections did not, therefore, stand in the way of the lands being occupied and entered under the homestead laws. The mere filing of its lists of selections of indemnity lands did not have the effect to exclude them from occupancy under the pre-emption or homestead laws. On

the contrary, notwithstanding the filing of such lists, they remained open, as before, to settlement or occupancy under those laws, until the selection were formally approved by the Secretary of the Interior, and the lands withdrawn from settlement or sale."

In Donohue vs. St. P. M. & M. Ry. Co. 101 Minn., 239 affirmed by this court in 210 U. S. 21, it is said: "In the first place, the mere selection of the lands by the railway company conferred upon it no title in equity or otherwise. The approval of the Secretary was essential to the efficiency of the selections. * * * His action in that matter was not ministerial, but judicial."

Now let us see what the Supreme Court of Minnesota thinks of this question.

There are a great many cases decided in this State, but I deem it necessary to call attention to only two or three of them.

In Sage vs. Maxwell, 91 Minn., at page 533, it is said "as to indemnity lands, no title thereto could vest in the company until the deficiency in the place lands was ascertained, and a selection of lieu lands from indemnity limits made and the selection approved by the Secretary of the Interior."

Such selection and approval were conditions precedent to the vesting of title, and until such conditions were performed the lands, unless with-

drawn from market, were open to private entry and settlement.

Attention is called to the fact that the land grant construed in the Maxwell case is the same as the one under consideration.

In Northern Pacific Railway company vs. Wass that court after reviewing Hewitt vs. Schultz 180 U. S. 139, in which case it was held that under the act of July 2nd, 1864; the Secretary of the Interior had no authority to withdraw all of the lands included within the indemnity limits and until a valid selection is made such lands were open to disposition by the government, U. S.; Oregon and C. R. Co. vs. U. S. 189 U. S. 103.; U. S. vs. Anderson 194 U. S. 394: St. Paul and Sioux City R. Co. v. Winona & St. Peter R. Co., 112 U. S. 720; Wisconsin Cent. R. Co. v. Price County, 133 U. S. 496; U. S. v. Missouri, K. & T. Ry. Co., 141 U. S. 358; Humbird vs. Avery, 195 U. S. 480.

The Supreme Court of Minnesota in the Wass case say then:

"The only question involved is whether the land was open to settlement under the United States homestead laws between the date of filing the proper list of selection and the date of approval thereof by the Secretary of the Interior. It is conceded by the demurrer that a proper list of selection was filed with the Secretary of the

Interior on February 12, 1892; that respondent settled on the land in April, 1899, and made application to enter the land under the homestead law December 4, 1899; and that the selection was finally approved February 16, 1905."

The Court then proceeds to say:

"We have carefully considered the cases above referred to, among others, and while it is true that the rights of a homesteader who made settlement after the date of filing the list, was not directly presented by the facts in the Sjoli case, nor in any of the decisions upon which it was apparently based, yet the propositions of law are so clearly announced that we cannot avoid the conclusion that it was the intention of the court to decide that the railroad company acquired no rights whatever for any purpose until the approval of the list by the Secretary of the Interior; that it was the intention of the court to hold that the grant applied to such lands only as might be found unappropriated within the place limits upon the filing and approval of the map designating the location of the road, and that the company was merely given an opportunity to supply the deficiency, if any, from the so-called indemnity limits; that the Secretary of the Interior, and not the company, should do the selecting; that, conceding the Secretary was not required to act at all until the company made pre-

liminary selection, setting off tract against tract, still, after the company had done all in its power to bring the matter before the secretary, that officer might dispose of it at his convenience; that although the secretary had reasonable time to examine into the facts and determine disputed questions, notwithstanding such contingencies and delays, the land was subject to settlement in the meantime, and the attempt of the company to secure the same was without avail. Such we understand to be the effect of the decision, and while doubtful that such granting acts as theretofore construed by that court, and by the land department, were authority for the conclusion reached, we feel compelled to accept the decision as conclusive in the case before us. We are justified in this view by the recent decision of the Circuit Court of Appeals, Eighth Circuit, in the case of Hoyt v. Weyerhaeuser, 161 Fed. 324, where that court construed the opinion in Sjoli v. Dreschel, and applied the principles there announced to a case similar to this.

Let us next see what the land department think of the question.

"In Vandeberg vs. H. & D. Ry. Co., 26 L. D. 390.

A case, by the way, in which the land grant now in question was considered, it was held that "The rights of a settler who is residing on land

covered by a prior indemnity selection, and whose settlement is subject to such selection, will attach on the cancellation of said selection, if the land is then open to settlement, and defeat the right of the Company under a subsequent selection. Vandeberg's rights under his continued residence upon and claim to this land surely attached as a settler upon the cancellation of said selection (of '83) and his claim, since maintained and asserted is superior to the right of the Company under selection, 1891. In this case settlement was made on the land April 15, 1891. Application for homestead made Aug. 20, 1894.

In Hastings & Dakota Ry. Co. vs. Arnold, 26 L. D. 538, it was decided:

1st. Land of this grant restored to public domain.

2nd. Settlement prevents selection.

3rd. Failure to enter does not revive selection.

Only one more case will be cited on this feature, and as far as I know it is the last in which this court has considered the question.

St. Paul, M. & M. R. Co. v. Donohue,
210 U. S. 21.

Quoting from page 31: "Both under the preemption law and under the homestead law after the act of 1880 the rights of the settler were initiated by settlement."

Let us next compare the facts in the present case with those in Sjoli v. Dreschel supra. The defendant in error settled on the land May 15, 1889, and has lived there ever since (R. page 16) has been trying to get it as a homestead (page 16) and has made valuable improvements thereon (page 17) has never made any other application for homestead entry on any other tract of land (R. page 21) is a qualified homesteader and on Nov. 3rd, 1891 (R. pages 43-45) made his application.

There was no ground for refusing it. As long as there was no legal grounds for refusing his application it does not make any difference what reasons were given for refusing it. As a matter of fact it was because it was erroneously supposed it had been withdrawn from settlement, but as already stated what difference does it make whether any reasons were given for refusing to accept application. From what has been stated he was clearly entitled to make entry and the officers of the land office did wrong in not permitting him to do so.

In the Sjoli case the railroad company filed the map designating its definite route Nov. 21, 1871 which map and location was approved Dec. 26, following. On June 19, 1885 filed its list of selections at the proper land office, which like the one in the present instance was rejected. In

July, 1885, the company appealed from that decision. Sjoli settled on the land in 1884. In 1889 he applied at the land office to make entry under the homestead law. This application was refused. No appeal was taken. In 1895 he made an other application which was allowed and a patent issued, It appears to me that the facts are as strong in our favor as the facts were in Sjoli in that action and as strong as were the facts in the Maxwell case above cited. In the last case the application for a homestead was made February 27, 1894, more than two years later than the defendant's application herein.

These two cases it seems to me are a sufficient answer to that part of counsels' argument found on pages 20 and 21 in which they seem to contend that we lost our rights, by waiting too long after settlement before making application of homestead entry.

The counsel for plaintiff's in error suggestions seems to me, in view of the undisputed evidence that he has resided on the land since May 15, 1889, ask this court to construe his application for homestead entry rather strictly. In that application made Nov. 3rd, 1891, he states that he at that time resided on the land and still ask this court to say he did not reside there on Oct. 29th, 1891, when the company made its last selection. The order restoring the land to the

public domain is dated Oct. 23, 1891, issued by Secretary Noble presumably at Washington. It would take at least from two to three days to reach the land office in Minnesota. No one interested in the land, unless he had an attorney especially employed in Washington, would be likely to know or hear of the decision until after the company had made its second selection on Oct. 29th, 1891. This is asking too much haste for a settler on the Minnesota prairies miles away from a railroad and points of communication.

In closing this feature of the case, attention is specifically called to the fact that the selection of 1891 was not approved until June 18, 1900, (R. page 39).

At this time I want to call the court's attention Tarpey v. Madsen, 178 U. S., 215, so copiously copied from in counsel's brief, pages 23 to 25. The court will notice that in that case one Moroni Olney on May 29th, 1869, made application for a homestead entry alleging a settlement thereon in April 23, 1869, (note the difference between that application and the present one in that he alleges a CERTAIN date prior to the date of application as the date of settlement; in the present case it is alleged that he resided there on Nov. 3rd.) Nothing further was done by Olney as he abandoned the land. On June 20th, 1896,

one Andrew Madsen attempted to make a filing on the land under the homestead law. The contest in that case was with Madsen. The decision against him even on such state by facts was by divided court. From the language of this court in that opinion at page 220, viz: "If Olney, the original entry man, was pressing his claim, every intendment should be in his favor in order to perfect the title which he was seeking to acquire. But when the original entry man, either because he does not care to perfect his claim to the land, or because he is conscious that it is invalid, abandons it, and a score of years thereafter some third party comes in and attempts to dispossess the railroad company (grantee of Congress) of its title—apparently perfect and unquestioned during these many years—he does not come in the attitude of an equitable appellant to the consideration of the court," and from other portions of the opinion it is fair to assume that had the contest been with Olney, the original applicant, that the decision would be in his favor.

As to whether the trustee of the Hastings & Dakota Co. had authority to make the selection. The railway company having ceased to exist on March 23, 1890, three years after the entry of the forfeiture judgment, had no right through its trustees or otherwise to select any lands. This point is so important, in these cases, and to us so

evident that we wish to urge it now most sincerely and earnestly.

In the decision found in 36 Minn., 246, the charter of the Hastings & Dakota Railway Co. was forfeited.

Under the principle of the common law the effect of the dissolution of the corporation is to put an end to its existence for all purposes and to destroy every one of its faculties so that thereafter it cannot make contracts, nor sue or be sued, all debts to it, or from it, become extinguished, and all actions by or against it abate.

Sec. 6718 Thompson on Corporations, 44 Minn. 460.

Statutes have been passed continuing the existence of corporations for certain purposes and for certain length of time. In our State for 3 years for the purpose of winding up affairs. At the end of that time the condition of things would be precisely the same as it would have been if the corporation had at that time been dissolved without such a statute being in existence.

Sec. 6734, Thompson on Corporations.

During the period in which the existence of the corporation thus extended, no power can be exercised by it, or in its name, except such as may be necessary for the winding up of its affairs.

Sec. 6736, Thompson on Corporations.

Mariners Bank vs. Sewall, 50 Me. 220.

If the charter of the corporation is repealed by a valid act of the Legislature, its dissolution takes effect at the time when the repealing act takes effect and is not postponed by statute continuing the corporate faculties for three years for the purpose of winding up its affairs. The company conveyed to Russell Sage, as trustee, the land which it then owned and in addition assumed to transfer to him its interests in the land grant. This transfer was not for the benefit of creditors, but for the exclusive benefit of the PREFERRED STOCK-HOLDERS of the company.

We maintain that this is not one of the purposes which the company had its existence continued under Sec. 3431, Gen. St. of 1894, and that Mr. Sage had no right to make any selection of any indemnity land.

When a corporation is dissolved it ceases to be a corporation f or the purpose of continuing the business for which it was established. It retains only power to gradually settle and close its concerns and upon the appointment of a receiver that power is placed in him, and its property and assets are in custodia legis. After dissolution it has no power to perform its contracts, even though it is made with third parties. The

rights of the parties are fixed at the date of the dissolution."

56 Minn, 171.

In Mumma vs. Potomac Co., 8 Peters 281, it is held that forfeiture of the charter of a corporation has the effect as the death of a person in taking away its standing in law and in the courts and says:

"It would be a doctrine new in the law that the existence of a private contract of a corporation should force upon it a perpetuity of existence."

See also Thornton vs. Railway Company, 123, Mass. 32.

Wherein it is said "a company at the expiration of three years ceases to have any such existence that a valid judgment could be rendered against it in any action at law."

The case of Hanan vs. Sage, 58 Fed. 651, generally relied upon by the appellant to sustain his contention that Sage, as trustee, had a right to select land, is not in point as we understand it.

The tract of land involved in that action was within the place limits and the rights of the Hastings & Dakota Railway Co., to that particular land became fixed at the time of the filing of the map of the definite location. The company was

the absolute owner of the land involved in that case and the courts simply held that during the three years allowed it to wind up its affairs it could convey this tract of land, but did not hold that this deed of trust could in anywise prolong the life of the corporation as it necessarily must in case it had a right to make any selection in 1891.

The cases heretofore cited show that the indemnity grant gives no vested rights whatever in such land. The right to select could not be transferred by the deed of December 9th, 1899.

It was held in Southern Pacific Railway Co. vs. Bell, 183, U. S. 675, as follows:

"As to lands within the indemnity limits the contract was based upon two contingencies, that of losing lands in place and being able to find sufficient to indemnify the company among the odd numbered sections within a certain further limits of 10 miles. Here the interest of the company was so remote and contingent, being a mere potentiality and not a grant that the government declined to order a withdrawal for the benefit of the same or even order a survey within the territory." Being so remote how could it be possible that they could be transferred under that deed even if it had been specifically included within its terms.

I also claim that the case of Humbird vs. Avery, 195 U. S. 480 is authority for the proposition that the Hasting & Dakota Railway Co. could not by its deed assign to Russel Sage the right to make the selection. At page 507 this court uses the following "UNTIL THE SELECTIONS WERE APPROVED there were no selections in fact, only preliminary proceedings taken for that purpose; AND THE INDEMNITY LANDS REMAINED UNAFFECTED IN THEIR TITLE. Until then the lands which might be taken as indemnity were incapable of indentification; the proposed selections remained the property of the United States. The government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts."

Plaintiff has had no possession within 15 years next before the commencement of this action hence cannot maintain ejectment.

It is an admitted fact that the Plaintiff, or those under who they claim have never had possession of this land.

R. L. 1905, Sec. 4073 of Minnesota.

Reads "No action for the recovery of real estate, or the possession thereof, shall be main-

tained unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within fifteen years before the beginning of the action "

This, by the way, has been the law for a number of years in Minnesota.

Language could be no plainer. To enable a party to maintain an action for the recovery of real estate such party must have been seized or possessed of the land within 15 years.

The decision in Moas vs. Bufdtzke, 93 Minn. 295 does not turn upon the point here raised, but there is a strong intimation in the opinion at page 297, that the Minnesota court would so hold.

The respondent also desires to raise the point that the District Court of Ramsey County had no power to make the order found in fol. 186-211. No part of the property involved in the so-called Sage Trust Deed purporting to be assigned to the present plaintiffs by said order is located in Ramsey County and hence that court had no jurisdiction to appoint plaintiffs as successors to Sage as Trustee.

FINALLY.

We do not think it was error to admit Exhibits "3 and 4" but if so it was clearly error without prejudice and the same might be said as to the reason found by the Court for refusing to

permit the defendant to make a homestead application on the land.

It is respectfully submitted that the decision appealed from is right and should be affirmed.

C. A. FOSNES,

Attorney for Defendant in Error.

OSBORN ET AL., TRUSTEES OF THE HASTINGS AND DAKOTA RAILWAY CO. *v.* FROYSETH.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 395. Submitted January 5, 1910.—Decided March 14, 1910.

A rejection of a homestead entry on the ground that the land was not open for settlement does not defeat the entry if the Secretary had no authority to withdraw the land from settlement. *Sjoli* v. *Dreschel*, 199 U. S. 564.

In an action of ejectment by a railroad company claiming lieu lands under its grant, against a homesteader, the rule applies that the plaintiff must recover on his legal title and not upon defects in defendant's entry; the question is whether the entry was properly initiated before the selection and not whether it had actually ripened into legal title.

In a contest between a *bona fide* homesteader and one claiming under selection of lieu land the former has the better claim.

The right of a homesteader settling in good faith relates back to the date of settlement.

Where a railroad company fails to comply with the statutory requirements in order to authorize selection of lieu lands in the indemnity limits, and its selection is rejected, a subsequent selection does not relate back, but preëmption or homestead rights duly initiated before the second selection have priority.

Land that is actually occupied by a qualified entryman with intent to claim it as a homestead, ceases to be public and subject to selection as lieu land, even though there be no record evidence at the time the selection is made.

107 Minnesota, 568, affirmed.

THIS was an action of ejectment to recover the southeast quarter of section 7, township 119, range 40, in Chippewa County, Minnesota. A jury was waived and the case tried by the court, which made a finding of facts upon which judgment was entered for the defendant. Upon appeal to the Supreme Court of the State this judgment was affirmed.

107 Minnesota, 568. Thereupon, in due course, this writ of error was sued out by the original plaintiffs.

The plaintiffs claimed title under a land grant made by Congress, July 4, 1866, known as the Hastings and Dakota Railway land grant. The premises are not within the place limits of that grant, but are included within the indemnity limits of the line of railroad as located, and were withdrawn from settlement for the benefit of the grant on July 12, 1866, and again by a modified order of April 22, 1868. On May 26, 1883, the Hastings and Dakota Railway Company, for whose benefit the grant was made, and hereafter referred to as the railway company, attempted to select the land in question, together with other lands within the indemnity limits of the grant, but the selection was rejected by the local land office of the district. Upon appeal this action was affirmed by the Secretary of the Interior on October 23, 1891. This attempted selection was refused, because not made in accordance with the rules of the Department, requiring, as a condition precedent, that there should be furnished by the railroad company a list of the lands lost within place limits for which lands in lieu were selected. On July 22, 1890, under the land grant adjustment act of March 3, 1887, c. 376, 24 Stat. 556, said land grant was adjusted in the Land Department of the United States, and it was found that there existed a deficiency in the place limits of the grant of 922,182 acres, and that all of the lands within the indemnity limits applicable to cover such loss aggregated less than 100,000 acres. On May 28, 1891, pursuant to instructions from the Secretary of the Interior, the Commissioner of the General Land Office directed the officers of the proper local office that, after giving notice, they should restore to the public domain and open to settlement all the lands in the indemnity limits of said land grant, "not embracing selections heretofore made and applied for by said company."

After the final rejection, on October 23, 1891, of the original selection made in 1883, the predecessor of the plaintiff in title

made a second selection on October 29, 1891, of the land in suit, together with other lands, which last selection was in due form and in full compliance with the rules of the Department, and thereafter, through steps not necessary to be stated, the title acquired by this second selection under said grant was vested in the plaintiffs in error.

The tenth, eleventh and twelfth findings of fact are in these words:

"Tenth. At the time of said selection the land in question was not vacant, but was occupied by the defendant Peter Froyseth, as hereinafter found.

"Eleventh. Said selection was not approved by the Secretary of the Interior until 1901.

"Twelfth. That the defendant, on the 1st day of November, 1888, declared his intention to become a citizen of the United States, and was after said date in all respects qualified and entitled to make a homestead entry under the laws of the United States, and, on May 15th, 1889, he settled upon and went into possession of the land in controversy, with intent to enter upon and claim the same as a homestead, and with the view of making it his home, and has continued in possession and resided thereon ever since, and his residence and improvements were at all times sufficient to comply with the requirements of the homestead laws of the United States, and at the time of the commencement of this action such improvements exceeded in value the sum of seven hundred dollars ($700); that the defendant has never owned or occupied other real estate. That he became a full citizen of the United States on June 9, 1897, and has been such citizen ever since. On the 3d day of November, 1891, the defendant offered, at the proper land office, a homestead entry in due form for said land, which filing was refused by the local land officers solely on the ground that said land was withdrawn from settlement by the executive withdrawal of April 22d, 1868, from which refusal the defendant duly appealed, which appeal remained pending in the Land Depart-

ment until September 11th, 1894, on which date the rejection of said filing by the local land officers was affirmed. From the decision of the General Land officers the defendant appealed to the Secretary of the Interior, which appeal was pending until the 25th day of January, 1896, when the decision of the General Land Office of September 11th, 1894, was affirmed. That the defendant did all that was in his power to secure the land as his homestead."

Mr. Aldis B. Browne and *Mr. Alexander Britton* for plaintiff in error.

Mr. C. A. Fosnes for defendant in error.

MR. JUSTICE LURTON, after making the foregoing statement of facts, delivered the opinion of the court.

The facts found show that on May 15, 1888, the defendant in error, being in every way qualified, entered upon the land in question with the intention of claiming it as a homestead, and has ever since continued in possession, residing thereon with his family, and that his improvements have at all times been such as to comply with the homestead laws and exceeded in value seven hundred dollars when this action of ejectment was started. On November 3, 1891, he offered at the proper land office a homestead entry, in due form, for said land. This was rejected. Upon appeal the decision was affirmed by the Secretary of the Interior on September 11, 1894. But the facts found in the trial court, and upon which the Supreme Court of Minnesota made its decision, show that this entry was refused by the local land office "solely on the ground that said land was withdrawn from settlement by the executive withdrawal of April 22, 1868." A rejection upon the ground stated was not authorized, for the Secretary of the Interior had no authority to withdraw from settlement lands within the indemnity limits of the grant which had not been before selected and approved by

him. *Sjoli* v. *Dreschel*, 199 U. S. 564, and cases cited. It has been insisted that although the local land office rejected the application for the reason stated, the affirmance, upon his appeal, was because his homestead application, instead of alleging that he had settled upon the land at some date prior to the selection made by the railroad company on October 29, 1891, simply alleged, that "he resides on the described land." This contention as to the grounds of the affirmance is only made out by the introduction now for the first time of the decision of the Secretary of the Interior under date of January 25, 1896. But that simply affirms the decision of the Commissioner made September 11, 1894, affirming the rejection made by the local land office, and gives no reason for the affirmance. This decision is sought to be explained by what purports to be a copy of an official communication under date of September 11, 1894, from the Commissioner to the local land register and receiver, notifying him that his rejection of a number of homestead entries, including that of Froyseth, on the indemnity lands in question, had been affirmed. Among other matters in that communication, it is stated, "that none of the applicants allege that the lands were settled upon either by themselves or others at the date of the said selections in October, 1891, by the Hastings and Dakota Company, nor do the records show that the lands were otherwise than vacant and subject to such selection at said date." If this be competent for our consideration upon this writ of error, it being no part of the record, it does not appear that the applicant was ever advised of this supposed defect in his affidavit. The local office simply advised him that its decision had been affirmed. The matter was remediable, as the fact was that his settlement was made months prior to his application affidavit. But, assuming that the application in its then form was defective, it is of no legal consequence in determining the validity of the title of the plaintiff in error. This was a plain common-law action of ejectment. The plaintiff must recover, if at all, upon the

legal title. That the defendant's application for a homestead has not yet ripened into a legal title is of no moment if the plaintiffs are unable to show a complete and superior legal title. The plain effect of the settlement made upon the land here in controversy before any valid selection of the same land by the railroad company, under its grant, was to initiate a homestead right. That settlement and possession continued from the time it was first made, and when, in October, 1891, the Hastings and Dakota Railroad, or its successors in title, attempted to select that land as indemnity land, the land in question was in the actual occupancy of Froyseth claiming it as a homestead. It had, by such settlement, been segregated from the lands subject to selection, and in a contest between such a homesteader and those claiming under selections subsequently made of lieu lands the claim of the former is the better claim. Under the act of May 14, 1880 (ch. 89, 21 Stat. 141, § 3), the right of one, settling in good faith for the purpose of claiming a homestead, "relates back to the date of settlement." *Nelson* v. *Northern Pacific Railway*, 188 U. S. 108; *Sjoli* v. *Dreschel*, 199 U. S. 564; *St. Paul &c. R. Co.* v. *Donohue*, 210 U. S. 21. But it is urged that the original selection made May 26, 1883, was valid, and operated to vest the title as of that date in the railroad company. There is nothing peculiar in the act of July 4, 1866, which protected indemnity lands against settlement upon the filing of a map showing definite location of the railroad. The grant was one of every alternate section of land, designated by odd numbers, to the amount of five alternate sections per mile on each side of the road. Then follows the indemnity provision, in these words (July 4, 1866, c. 168, 14 Stat. 87):

"But in case it shall appear that the United States have, when the lines or route of said roads are definitely located, sold any section, or part thereof, granted as aforesaid, or that the right of preëmption or homestead settlement has attached to the same, or that the same has been reserved by the United

States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purpose aforesaid, from the public lands of the United States, nearest to the tiers of sections above specified, so much land in alternate sections or parts of sections designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or preëmption has attached, as aforesaid, which lands, thus indicated by odd numbers and sections, by the direction of the Secretary of the Interior, shall be held by," etc.

The rejection by the Secretary of the Interior of the selection made in 1883 is fatal to any claim now made to carry back the title of the plaintiff in error to that selection. The right to any land within the indemnity limits of the grant, as has been often decided, depended upon the inquiry whether deficiencies had been established within the place limits, and also whether the lands selected in place of such lost lands were at the time subject to such appropriation. Thus, if either preëmption or homestead rights had been initiated before such selection, the parcels to which such right had attached were not subject to appropriation as indemnity lands. The function of the Secretary of the Interior was therefore judicial and not ministerial. *Wisconsin Railroad Company* v. *Price County*, 133 U. S. 496, 512. In the case cited above this court said:

"Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then, the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. The Government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts. The doctrine, that until selection

made no title vests in any indemnity lands, has been recognized in several decisions of this court. Thus in *Ryan* v. *Railroad Co.*, 99 U. S. 382, 386, in considering a grant of land by Congress, in aid of the construction of a railroad similar in its general features to the one in this case, the court said: 'Under this statute, when the road was located and the maps were made, the right of the company to the odd sections first named became *ipso facto* fixed and absolute. With respect to the 'lieu lands,' as they are called, the right was only a float, and attached to no specific tracts until the selection was actually made in the manner prescribed.' And again, speaking of a deficiency in the land granted, it said: 'It was within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had not and could not have any claim to it until specially selected, as it was for that purpose.'"

In *Sjoli* v. *Dreschel*, 199 U. S. 564, 566, this court said:

"That up to the time such approval is given, lands within indemnity limits, although embraced by the company's list of selections, are subject to be disposed of by the United States or to be settled upon and occupied under the preemption and homestead laws of the United States."

But it is urged that the mere fact that there was no record evidence of the homestead claim when the selections of 1891 were made was enough to give efficacy to that selection and vest the legal title under the patents thereafter issued. But this is answered by what we have already said, namely, that if at that date this land was actually occupied by one qualified under the law, who had entered and settled thereon before that time, with the intent to claim it as a homestead, the land had ceased to be public land and as such subject to selection as lieu land.

We find no error in the judgment of the Supreme Court of Minnesota, and it is

Affirmed.

MR. JUSTICE BREWER did not sit in this case.